IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1651

NEW JERSEY DENTAL ASSOCIATION, a Not-for-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-for-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-for-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-for-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual, and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS, PETITION FOR WRIT OF MANDAMUS and PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

—

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS.

The petitioners move the court for leave to file the petition for writ of mandamus, hereto annexed, and further move that an order and rule be entered and issued directing the United States District Court for the District of New Jersey, and particularly the Honorable Stanley S. Brotman, District Judge of said District, to show cause why a writ of mandamus should not be issued against such District Court, in accordance with the prayer of said petition, and why the petitioners should not have such other and further relief that may be just and equitable.

ARTHUR MEISEL.

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NEW JERSEY DENTAL ASSOCIATION, a not-for-profit corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a not-for-profit corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a not-for-profit corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a not-for-profit corporation of the State of New Jersey, DR. PAUL G. ZACKON, an individual, DR. DONALD DeFONCE, an individual, DR. EUGENE BASS, an individual, DR. LEWIS KAY, an individual, DR. STANTON DEITCH, an individual, DR. ROBERT FISCHER, an individual, and DR. JOSEPH POLLACK, an individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, AND PARTICULARLY TO THE HONORABLE STANLEY S. BROTMAN, DISTRICT JUDGE OF SAID DISTRICT

AND

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners pray that a writ of mandamus issue to the United States District Court for the District of New Jersey, and particularly to the Honorable Stanley S. Brotman, District Judge of said District, to show cause on a day to be fixed by this Court, why an order should not be issued directing the aforesaid judge and the United States District Court (a) to dismiss the complaint in an action instituted by Health Corporation of America, Inc., *et al.*, against petitioners in the United States District Court for the District of New Jersey, Civil Action File No. 75-2022 or (b) to supplement respondent's order denying petitioners' motion to dismiss by adding the language required by 28 *U. S. C.* § 1292(b) so that leave may be sought to file an interlocutory appeal. Alternatively, petitioners seek review by writ of certiorari.

OPINIONS BELOW.

The opinion of the United States District Court for the District of New Jersey (A46) is not reported in the Federal Supplement, but is reported unofficially as follows: *Health Corp. of America v. New Jersey Dental Assn.*, 1977-1 *Trade Cases*, par. 61,232. The opinion of the United States Circuit Court of Appeals for the Third Circuit is not reported (A59).

JURISDICTION.

This matter is brought to review an order of the United States Circuit Court of Appeals for the Third Circuit rendered on February 24, 1977 and entered on the same date. The jurisdiction of the Supreme Court of the United States to review this suit (a) by certiorari is conferred by Title 28, *United States Code*, Section 1254(1), and alternatively (b) by Writ of Mandamus pursuant to Title 28, *United States Code*, Section 1651.

The relief sought is not available in any other court because the United States Circuit Court of Appeals for the Third Circuit, by its order dated February 24, 1977, denied the petition for writ of mandamus filed by petitioners. No reasons were stated for said denial. In addition, the relief sought cannot be had through other appellate processes because if, as petitioners respectfully contend, the order denying the dismissal of the private antitrust action brought by Health Corporation of America, Inc., *et al.* (hereinafter "NADP") "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation", 28 *U. S. C.* § 1292(b), then petitioners will be denied a prompt and expeditious opportunity to dispose of the litigation as contemplated by the Congress of the United States. Absent the issuance of a writ of mandamus, there will be an extravagent and substantial waste of time and money on the part of the courts and the litigants, a situation which Congress intended to avoid by the enactment of 28 *U. S. C.* § 1292(b).

QUESTIONS FOR REVIEW.

1. Will a Writ of Mandamus issue to compel a district judge to dismiss a private antitrust action alleging injury to a business conducted in violation of state health and insurance laws?

2. Present a clear abuse of discretion, can a district judge be directed to incorporate in his order the language required by 28 *U. S. C.* § 1292(b) so that leave may be sought to file an interlocutory appeal.

STATUTES INVOLVED.

The case involves the following statutes, which are hereinafter set out verbatim, together with an accompanying citation to the volume and page where they may be found in the official edition:

15 *U. S. C.* § 15

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. (Oct. 15, 1914, ch. 323, § 4, 38 Stat. 731.)

United States Code, 1970 ed., Volume 3, pages 2983-2984

15 *U. S. C.* § 26.

Injunctive relief for private parties; exception.

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. (Oct. 15, 1914, ch. 323, § 16, 38 Stat. 737.)

United States Code, 1970 ed., Volume 3, page 2991

28 *U. S. C.* § 1292(b).

Interlocutory decisions.

• • •

(b) When a district judge, in making in a civil action an order not otherwise appealable under this

section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, § 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.)

United States Code, 1970 ed.,
Volume 5, page 7563

28 *U. S. C.* § 1651.

Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (June 25, 1948, ch. 646, 62 Stat. 944; May 24, 1949, ch. 139, § 90, 63 Stat. 102.)

United States Code, 1970 ed.,
Volume 5, page 7601

STATEMENT OF THE CASE.

NADP brought a private antitrust action against petitioners under Sections 4 and 16 of the Clayton Act, 15 *U. S. C.* §§ 15 and 26, to recover for alleged violations of Sections 1 and 2 of the Sherman Act, 15 *U. S. C.* §§ 1 and 2.

In particular, NADP alleged that petitioners conspired to restrain trade in the provision of health care programs and benefits in violation of Section 1 of the Sherman Act by instituting sham lawsuits and regulatory board proceedings, and by using threats, harassment, coercion and the dissemination of misinformation to induce dentists not to contract with NADP. It was further alleged that the aforesaid acts also constituted a conspiracy to monopolize and the monopolization of the delivery of dental health care programs in violation of Section 2 of the Sherman Act, tortious interference with NADP's business and violation of Sections 3 and 4 of the New Jersey Antitrust Act, *N. J. S. A.* 56:9-3 and *N. J. S. A.* 56:9-4 (A47).

Petitioners filed and served a notice of motion seeking the dismissal of the aforesaid complaint upon the ground that NADP, which operated its business in violation of state dental and insurance laws, could not be injured in its business or property within the meaning of Section 4 of the Clayton Act, 15 *U. S. C.* § 15 and could not suffer a legally cognizable loss or damage under Section 16 of the Clayton Act, 15 *U. S. C.* § 26 (A48).

Petitioners' motion was predicated upon separate and independent decisions by the Superior Court of New Jersey, Chancery Division (A1),[1] and the New Jersey State Board of Dentisty (A35) holding, respectively, that NADP was engaged in the illegal operation of a dental service

1. Said decision was affirmed by a unanimous Appellate Division on March 2, 1977 "substantially for the reasons given by Judge Lenox in his oral opinion of April 30, 1976".

corporation in violation of the Dental Service Corporation Act of 1968, *N. J. S. A.* 17:48C-1 *et seq.*, and the unlicensed practice of dentistry in violation of the laws governing the practice of dentistry in New Jersey, *N. J. S. A.* 45:6-1 *et seq.* The damages claimed by NADP in its private antitrust action were for injuries to a business in which it was not entitled to engage.

Although neither petitioners nor NADP raised the issue of unclean hands in their respective briefs or at oral argument, respondent mistakenly treated petitioners' motion to dismiss as raising only that issue and, on that basis alone, he denied the motion in an opinion dated and filed January 5, 1977. The opinion did not discuss whether NADP had been injured in its business or property within the meaning of Section 4 of the Clayton Act, or suffered injury or damage under Section 16 thereof.

Upon reviewing the aforesaid opinion, petitioners requested, in the alternative, that the Court (a) reconsider its decision, or (b) include in the form of order denying the motion a statement as provided in 28 *U. S. C.* § 1292(b) so that petitioners could seek leave to file an interlocutory appeal (A54).

With respect to the second alternative request, petitioners pointed out that the matter before the Court clearly involved a controlling question of law and that an immediate appeal may materially advance the ultimate termination of the litigation. They also indicated that every substantively analogous reported case involving the issue of standing had resulted in a dismissal. Therefore, the decision by respondent created a difference of opinion which never theretofore existed with respect to the controlling question of law. Respondent refused the request to reconsider and, by letter dated January 18, 1977, advised all counsel that the Court would not certify the order under 28 *U. S. C.* § 1292(b) (A57, A58).

Thereafter, a petition for writ of mandamus was filed with the United States Court of Appeals for the Third Circuit on February 22, 1977. Said petition was denied by order dated February 24, 1977. No reason was given by the Court for its denial (A59).

REASONS FOR ALLOWANCE OF WRITS.

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I.

Clear Abuse of Discretion.

A writ of mandamus is appropriately issued to remedy a clear abuse of discretion, *Bankers Life & Casualty Co. v. Holland*, 346 *U. S.* 379, 383 (1953); *Schlagenhauf v. Holder*, 379 *U. S.* 104, 110-111 (1964). Petitioners respectfully contend that the refusal by a district judge to dismiss a private antitrust action brought to recover damages to a business conducted in violation of state laws governing the practice of dentistry and the operation of dental service plans constitutes such a clear abuse of discretion as to warant the issuance of a writ of mandamus directing dismissal of the suit.

Petitioners moved the district court to dismiss the complaint filed against them by NADP on the ground that said company could not, as a matter of law, be injured in its business or property within the meaning of Section 4 of the Clayton Act, 15 *U. S. C.* § 15 because state law forbade NADP from engaging in the business which was allegedly injured. For the same reason, petitioners urged that a legally-cognizable loss or damage under Section 16 of the Clayton Act, 15 *U. S. C.* § 26 could not be suffered.

In denying petitioners' motion to dismiss, respondent mistakenly concluded that unclean hands, not standing, was the issue before the court:

> "Although defendants characterize their basis for dismissal as a lack of standing on the part of plaintiffs, the thrust of their argument is that plaintiff's illegal activities preclude them from enforcing the antitrust laws. They argue, in effect, that plaintiffs come into court with unclean hands, that plaintiff's failure to comply with statutory requirements is a defense to any antitrust violations defendants may have committed. No matter how defendants classify their contentions, the Supreme Court cases of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 *U. S.* 211 (1951) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 *U. S.* 134 (1968) must remain a starting point." (A49).

Due to the approach adopted by the district court in ruling upon petitioners' motion, the issue of standing was never considered.

While a motion to dismiss for unclean hands might have been raised below by petitioners, it was not. Said defense was noticeably absent from all briefs filed with the district court and was not mentioned by anyone, including respondent, at oral argument. The entire thrust of petitioners' motion was that NADP could not, as a matter of law, be injured in its business or property within the meaning of Section 4 of the Clayton Act, or suffer any legally cognizable loss or damage under Section 16 of the Clayton Act.

Standing and unclean hands are entirely distinct legal theories. Petitioners have not found any other case in which the two were confused.

An argument seeking a dismissal for lack of standing is neither deceptively sophisticated nor uncommon in private antitrust cases. It is addressed to the right of a person to bring an action. Absent injury to a legally cognizable business or property and absent damage, a private litigant has no actionable claim under the antitrust laws, *Keogh v. C. & N. W. Ry. Co.*, 260 *U. S.* 156, 163 (1922).

The reason is self-evident. Antitrust legislation was enacted to preserve competition among competitors, *Northern Pac. Ry. v. United States*, 356 *U. S.* 1, 4 (1958);

Apex Hosiery Co. v. Leader, 310 *U. S.* 469, 492-493 (1940); *Perkins v. Standard Oil Co.*, 395 *U. S.* 642, 648-649 (1969). To accomplish that end, private suits were permitted to recover damages for injuries to commercial interests or enterprises, *Hawaii v. Standard Oil Co.*, 405 *U. S.* 251 (1972).

A business entity cannot suffer either an injury to its commercial interests or a diminution in its ability to compete, *GAF Corporation v. Circle Floor Co., Inc.*, 463 *F.* 2d 752, 757 (2 Cir. 1972) *cert.* den. 413 *U. S.* 901 (1973); *Long Island Lighting Co. v. Standard Oil Co., of Cal.*, 390 *F. Supp.* 1172, 1176-1177 (S. D. N. Y. 1975), mod. other grounds, 521 *F.* 2d 1269 (2 Cir. 1975), *cert.* den. 423 *U. S.* 1073 (1976), if it is not permitted by law to engage in competitive activity. Since NADP was forbidden by state law from engaging in the practice of dentistry or operation of a dental service corporation, *N. J. S. A.* 45:6-13 and *N. J. S. A.* 17:48C-34, it had no legally cognizable commercial interest and could not have suffered any diminution in its ability to compete in those areas on account of petitioners' activities.

a. Injury to Business or Property.

Private antitrust actions cannot be maintained as a matter of right. Authority to initiate such proceedings is specifically conferred and regulated by Sections 4 and 16 of the Clayton Act, 15 *U. S. C.* §§ 15, 26. Those sections provide, respectively, and in relevant part, as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained . . . ."
>
> 15 *U. S. C.* § 15

> "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . ."
>
> 15 *U. S. C.* § 26

A private antitrust action seeking treble damages cannot be maintained unless a person has been "injured in his business or property", that is, in his commercial interests or enterprises, *Hawaii v. Standard Oil Co.*, 405 *U. S.* 251 (1972). Absent injury to business or property, there is no standing to maintain such an action.

Injury to business or property as used in Section 4 of the Clayton Act does not mean any type of injury but implies the violation of a right which one is legally entitled to enjoy, *Keogh v. C. & N. W. Ry. Co.*, 260 *U. S.* 156, 163 (1922). As stated by Mr. Justice Brandeis in Keogh:

> "Section 7 of the Anti-Trust Act [of 1890] gives a right of action to one who has been injured in his business or property. *Injury implies violation of a legal right.*"
>
> (Emphasis added.)

The standard announced in *Keogh* was applied to Section 4 of the Clayton Act in *Harrison v. Paramount Pictures*, 115 *F. Supp.* 312, 316 (E. D. Pa. 1953), aff'd 211 *F.* 2d 405 (3 Cir. 1953) *cert.* den. 348 *U. S.* 828 (1954), and in other cases too numerous to cite.

Although this Court has not yet decided whether a private antitrust action will lie to recover damages to a business conducted in violation of state or federal law, that question has been addressed, from time to time, by the lower courts.

In *Maltz v. Sax*, 134 *F.* 2d 2 (7 Cir. 1943), a private antitrust action was commenced under Section 4 of the

Clayton Act to recover treble damages from defendants who allegedly combined and conspired to restrain trade in violation of Section 1 of the Sherman Act. Defendants moved to dismiss on the ground that plaintiff's sole business was the manufacture and sale of gambling devices, the use and sale of which were against public policy and unlawful.

In affirming the dismissal of the action by the district court, the circuit court of appeals commented:

> "The second reason . . . [why plaintiff cannot recover] is to be found in the fact that *damages claimed were for an injury to something which the law did not recognize as a legal right*. . . . Plaintiff has no legal right in a business, the conduct of which was gambling, for which he may obtain protection either in an action at law, or by a suit in equity. He had no legal rights to protect. Therefore, defendants could not invade them."
>
> *Maltz v. Sax*, 134 *F.* 2d, *supra*, at 5. (Emphasis added.)

It should be noted that while gambling was illegal, the manufacture and sale of gambling equipment was not. Nevertheless, the court in *Maltz* found it paradoxical to lend its aid in the protection of a business, the practice of which was against public policy, if not unlawful, *Maltz v. Sax*, 134 *F.* 2d, *supra*, at 4.

Within the last two years, three cases followed the rational of *Keogh* and *Maltz*. In *Turner v. American Bar Ass'n.*, 407 *F. Supp.* 451, 479-480 (1975), a case remarkably similar to the one at bar, the district court dismissed eight separate actions against members of the federal judiciary and others by plaintiffs claiming a constitutional right to have unlicensed lay counsel assist them in court proceedings. Finding that plaintiffs did not suffer injury

of a type required to maintain a private antitrust action, the court observed:

> "To have standing to sue the plaintiff must sufficiently allege and demonstrate that his *legally cognizable business or property* has been injured as a proximate result of the alleged violation of the antitrust laws. This Court is convinced that the plaintiffs wholly lack standing to bring this private antitrust suit for the reason that the plaintiffs have failed to demonstrate that there is in fact any property or business, present or future, that is deserving of legal protection.
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> • • •
>
> "As there exists no right or privilege under the First or Sixth Amendments to have an unlicensed layman represent a party in litigation, this Court must conclude that *the* corresponding *'business' of laymen representing litigants in court does not exist or at least is not deserving of the legal protection of the antitrust laws.*"
>
> (Emphasis in original in part and added in part.)

Respondent distinguished *Turner* by commenting that NADP was not contending that it had a right to operate without complying with New Jersey statutes (A52). However, the critical infirmity with this reasoning is that the business in which NADP was actually engaged, and upon which it predicated its private antitrust action, violated both the laws governing the practice of dentistry and the operation of a dental service corporation. As in *Turner*, the "business" of unlicensed persons practicing dentistry does not exist in the State of New Jersey, or at least is not deserving of legal protection. To the extent that NADP hereafter complies with the laws of New Jersey, it must

restructure its operations in such a way that it will no longer be either practicing dentistry or operating a dental service corporation.

In *Lamp Liquors, Inc. v. Adolph Coors Company*, 410 *F. Supp.* 536 (D. Wyo. 1976), a private antitrust action was initiated to recover treble damages for alleged violations of sections 1, 2 and 3 of the Sherman Act (15 *U. S. C.* §§ 1, 2 and 3). Although the district court agreed that there would be a violation of the Sherman Act if the alleged conspiracy could be shown, the action was dismissed because the business allegedly injured by defendant's conduct was engaged in by plaintiff contrary to state law. Using language equally applicable to the case at bar, the district court stated:

> "In order to have standing under 15 *U. S. C.* § 15, a plaintiff must allege injury to a business or property interest by reason of acts or conduct which are prohibited by the antitrust laws. Whether the plaintiff has property which if injured would authorize a treble damage action depends upon whether what the plaintiff possessed was deserving of legal protection. *Martin v. Phillips Petroleum Co.*, C. A. Tex. 5th Cir. 1966, 365 F. 2d 269, cert. denied, 385 U. S. 991, S. Ct. 600, 17 L. Ed. 2d 451. *The business interest which plaintiff seeks to protect violates state* liquor control *laws* and these violations would justify suspension or revocation of Lamp Liquor's retail license under § 12-28, Wyo. Stat. *Accordingly, the plaintiff's property or business interest is in conflict with state law and not deserving of legal protection. Since the plaintiff lacks the necessary business or property interest, he also lacks standing to initiate this suit.*"
>
> *Lamp Liquors v. Adolph Coors Company*, 410 *F. Supp., supra*, at 541. (Emphasis added.)

Respondent made no effort in his opinion to distinguish *Lamp Liquors* as, indeed, he could not. Rather, he commented that the case was not persuasive saying, "The standing issue appears at the end of the opinion as an alternative ground of decision . . . We decline to follow the alternative holding of *Lamp Liquors.*" (A51, n. 3).

In *American Bankers Club, Inc. v. American Express Company*, 1977-1, *Trade Cases*, par. 61,247, decided January 18, 1977, the district court for the District of Columbia, in dismissing a private antitrust action for lack of standing on the ground that the business of plaintiff therein, which violated federal banking law, was not entitled to the protection of the antitrust laws, said:

> "Additionally, there is a fundamental defect with the claims of the plaintiff grounded as they are on Section 4 of the Clayton Act. That section authorizes recovery of treble damages on behalf of any person 'injured in his business or property by reason of anything forbidden in the antitrust laws'. Courts have refused to entertain claims under the antitrust laws where those claims were based on plans which violate the law, the courts finding that the business did not warrant the legal protection of the antitrust laws, *Lamp Liquors, Inc. v. Adolph Coors Co.*, (1976-2) *Trade Cases* par. 60,991 (D. Wyo.); *Martin v. Phillips Petroleum Co.* [1966 *Trade Cases*, par. 71,456] 365 F. 2d, 629 (5th Cir. 1966). The same must be said about the business of the plaintiff. *The plaintiff's plan of interest-bearing traveler's checks violates the federal banking laws. Thus plaintiff can have no business or property interest in marketing such checks and no right of recovery under the anti-trust laws.*

• • •

"It follows that the business of marketing interest-bearing checks is not open to plaintiff and plaintiff has no interest that is subject to protection under the anti-trust laws." (Emphasis added.)

Neither respondent nor any party to the proceeding below cited any contrary authority with respect to the issue of standing. However, *Semke v. Enid Automobile Dealers Association*, 465 *F.* 2d 1361 (10 Cir. 1972) was cited to respondent without comment by counsel for NADP after submission of briefs and oral argument. While bearing a facial similarity to the case below, the issue of standing was neither raised by counsel nor discussed by the Court in that case. Moreover, the opinion in *Semke* appears to acknowledge that a licensing statute, clear in its terms, can function to preempt the operation of the antitrust laws, even in the absence of an attack upon standing:

". . . even if . . . a licensing statute . . . serves to preempt the operation of the antitrust laws and serves to, in effect, exempt persons even though they are not acting pursuant to law from a private anti-trust suit, nevertheless *this* statute is not so clear in its terms that it could function in this manner."

Semke v. Enid Automobile Dealers Association, 456 *F.* 2d, *supra*, at 1368. (Emphasis in original.)

Unlike the statute in *Semke*, the Superior Court of New Jersey held that the statutory language of the Dental Service Corporation Act of 1968, *N. J. S. A.* 17:48C-1 *et seq.* is "clear and unambiguous" (A9, A12) and that "it is at once apparent that defendant [NADP] is a dental service corporation acting in non-compliance with the

statutory requirements" (A11). Similarly, the New Jersey State Board of Dentistry specifically found that NADP "is a lay corporation which offers, undertakes and holds itself out as practicing dentistry" (A41) and that said corporation is "unlawfully engaged in the practice of dentistry in . . . [the] State [of New Jersey]." (A43).

The decisions in *Maltz, Turner, Lamp Liquors* and *American Bankers*, cited hereinabove, are simply examples of the general principle that the antitrust laws are designed to preserve competition *only* among those who are lawfully entitled to engage in competitive conduct.

b. State Action.

Since *Parker v. Brown*, 317 *U. S.* 341, 350-351 (1943), it is firmly established that the Sherman Act does not apply to state action. A state, in its discretion, may regulate an industry in order to govern, or even to entirely eliminate, competitive freedom. The principle was cogently expressed in *Asheville Tobacco Board of Trade, Inc. v. F. T. C.*, 263 *F.* 2d 502, 509 (4 Cir. 1959) where the Circuit Court of Appeals for the Fourth Circuit observed:

"When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein."

That is precisely what has happened here. The legislature of the State of New Jersey has declared that a person may not engage in the practice of dentistry unless licensed so to do, *N. J. S. A.* 45:6-13, and that no person or corporation may engage in any activity provided for in the Dental Service Corporation Act of 1968, *N. J. S. A.* 17:48C-1 *et seq.*, unless organized and authorized in accordance with its provisions, *N. J. S. A.* 17:48C-34.

NADP's business constitutes both the practice of dentistry and the operation of a dental service corporation. It is expressly forbidden *by the state* from operating in either capacity.[2] Yet, this is precisely the business or property which NADP alleges has been injured by petitioners and upon which it predicated its private antitrust action.

c. Mandamus as Remedy.

Petitioners believe that the refusal by respondent to dismiss NADP's private antitrust action may properly be remedied by the issuance of a writ of mandamus. Although the precise question has not previously been decided by this Court, the Seventh Circuit was confronted with a substantively identical case wherein a writ was issued. In *Fink v. Igoe*, 279 *F.* 2d 544 (7 Cir. 1960), a district judge refused to dismiss or to transfer an action improperly brought in the United States District Court for the Northern District of Illinois, Eastern Division, although the record established that the action could not be maintained in said district. The circuit court of appeals directed the clerk to issue a writ of mandamus commanding the district judge to either dismiss the action, or under certain prescribed circumstances, transfer same, saying:

> "In summary, the record establishes that defendant Sam Fink does not reside and does not have a regular and established place of busines in the Northern District of Illinois, as contemplated by 28 U. S. C. A. § 1400(b). Therefore, *there is no basis in this record for maintaining plaintiff's action . . . in the District Court in the Northern District of Illinois, Eastern Division. It was and is the clear duty of respondent to either dismiss the action or transfer it to the Southern District of New York. He has declined to do either. An attempt was made by petitioner to take an appeal from respondent's order, pursuant to 28 U. S. C. A. § 1292,* governing interlocutory appeals. *Respondent refused to make the statement in writing contemplated by said statutory provision,* and the effort to appeal failed. *Thus a situation has developed which overcomes our usual reluctance to force action in the district court by means of an extraordinary writ.*"
>
> *Fink v. Igoe*, 279 *F.* 2d, *supra*, at 546 (Emphasis added.)

The case at bar is precisely analogous to *Fink*. Although there is positively no basis in the record for permitting NADP to maintain its action, respondent violated his clear duty to dismiss same and twice refused to make the statement in writing contemplated by 28 *U. S. C.* § 1292(b) so that petitioners could seek leave to file an interlocutory appeal. Under these extraordinary circumstances, it is respectfully urged that this Court should overcome its usual reluctance to force action in the district court, and should issue a writ of mandamus directing respondent to dismiss the action brought against petitioners by NADP.

II.

Issuance of Writ Directing Certification.

The right to appeal from an interlocutory order in the federal courts is governed by 28 *U. S. C.* § 1292. Subsection (b) of said statute provides, in pertinent part, as follows:

2. The anticompetitive effect in the present case is "compelled by direction of the State acting as a sovereign", *Goldfarb v. Virginia State Bar*, 421 *U. S.* 773, 791 (1975); *Cantor v. Detroit Edison Co.*, — *U. S.* —, 96 *S. Ct.* 3110 (1976), and not by any action taken by petitioners.

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground of difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . . ."

It is clear enough that the written statement contemplated by 28 *U. S. C.* § 1292(b) must be included in an order issued by the district court as a condition precedent to the power of a Circuit Court of Appeals to entertain an application for an interlocutory appeal. The question presented here is whether the Supreme Court, under the All Writs Act, 28 *U. S. C.* § 1651, can direct a district judge to include the required written statement in his order. To the extent that a writ of mandamus provides a remedy for a clear abuse of judicial discretion, there is no sound policy reason to prevent the issuance of a writ in such situations.

The purpose of the 1958 amendment to 28 *U. S. C.* § 1292, by which subsection (b) was added, was to "avoid protracted and expensive litigation, as in antitrust and similar protracted cases, where a question which would be dispositive of the litigation is raised and there is serious doubt as to how it should be decided." 1958 *U. S. Code, Cong. & Adm. News*, at 5259.

Commenting further upon the amendment, the Committee on the Judiciary of the House of Representatives stated, in pertinent part, as follows:

"There should be some way, for example, in long-drawn-out cases such as antitrust and conspiracy cases, to dispose of vital questions which are raised in

the trial without having to wait for the taking of testimony and the conclusion of the trial before the question can be finally determined on appeal. Without cataloging all of the cases in which interlocutory appeals could be proper, the following categories are those which would generally be affected: . . . (b) cases where a long trial would be necessary for the determination of liability or damages upon a decision overruling a defense going to the right to maintain the action . . . ."[3]

Accordingly, Congressional policy mandates the prosecution of interlocutory appeals in appropriate cases. To the extent that a district judge refuses, when warranted, to include in his order the language contemplated by 28 *U. S. C.* § 1292(b), there is subversion of expressed Congressional policy: the intent of Congress is thereby avoided rather than effectuated.

This Court has never ruled on the question of whether mandamus will lie to compel a district judge to certify a case under 28 *U. S. C.* § 1292(b). It is an important question of federal law upon which conflict and inconsistency exists among the circuit courts of appeals.

In *Plum Tree, Inc. v. Stockment*, 488 *F.* 2d 754, 755-756, n. 1 (3 Cir. 1973) the Court of Appeals for the Third Circuit said:

"We note that the use of mandamus as a means of forcing the district court to make a certification under 28 *U. S. C.* § 1292(b) does not seem appropriate, for there are authorities holding that the district court's decision on this question is not reviewable. See United States v. 687.30 Acres of Land, 451 F. 2d 667, 670 (8 Cir.) cert. den. 405 U. S. 1026, 92

3. House Report No. 1667, 85 Cong. 2d Sess., pp. 1, 2.

S. Ct. 1291, 31 L. Ed. 2d 486 (1971); Hirsch v. Bruchhausen, 284 F. 2d 783, 786 (2nd Cir. 1960)."

In *United States v. 687.30 Acres of Land, etc., State of Neb.*, 451 *F.* 2d 667, 670 (8 Cir. 1971), cited in *Plum Tree*, the Court neither reviewed the legislative history of 28 *U. S. C.* § 1292(b) nor analyzed the relationship of that statute to the All Writs Act, 28 *U. S. C.* § 1651. It tersely held, without discussion:

> "We have no jurisdiction to review the trial court's denial of the § 1292(b) certificate. There is a strong policy in the law against interlocutory appeals. Section 1292(b) by its unambiguous language makes certification by the trial court a condition precedent to our right to exercise our discretion on the question of whether an interlocutory appeal will be allowed."

Certainly the Court was wrong when it stated that it had no *jurisdiction* to review the trial court's denial of the § 1292(b) certificate. Such jurisdiction is conferred by the All Writs Act, 28 *U. S. C.* § 1651. See *Japan Line, Ltd. v. Sabre Shipping Corporation* and *Allegheny Airlines, Inc. v. LeMay*, discussed *infra*. And while there is, as a general rule, a strong policy in the law against interlocutory appeals, there is an even stronger policy, mandated by Congress, in favor of such appeals when the criteria established by 28 *U. S. C.* § 1292(b) are met.

Hirsch v. Bruchhausen, 284 *F.* 2d 783, 786 (2 Cir. 1960), the second of the two cases cited by the third circuit in *Plum Tree*, held, over the dissent of Judge Friendly:

> "Certainly we have no right or desire to control the trial judge's exercise of discretion in denying leave for an interlocutory appeal."

Just nine years after *Hirsch*, the second circuit reassessed its position in *Japan Line, Ltd. v. Sabre Shipping Corporation*, 407 *F.* 2d 173, 175 (2 Cir. 1969) and stated that a writ of mandamus could be issued in an appropriate case when a district judge has refused to certify a case under 28 *U. S. C.* § 1292(b):

> "We hold that 28 *U. S. C.*, Section 1292(b) does not supplant the All Writs Act. It is our view that in a proper case, the mere denial by a District Judge of an application for certification under 28 *U. S. C.*, Section 1292(b) does not preclude our consideration of a petition for any of the traditional writs."

An identical conclusion was reached in *Allegheny Airlines, Inc. v. LeMay*, 448 *F.* 2d 1341, 1346 (7 Cir. 1971), where the Court of Appeals for the seventh circuit commented:

> "The Note at 75 Harv. L. Rev. 351, 382, *supra*, suggests that a wrongful refusal to certify by the district court should be a ground for seeking mandamus although the courts of appeal have shown no interest thus far in mandamus to compel certification. No doubt this extraordinary writ will continue to be used very sparingly in disturbing the discretion exercised by the district court but on the other hand *there may well be appropriate cases justifying this extraordinary remedy. See Fink v. Igoe*, 279 *F.* 2d 544 (7th Cir. 1960)".
>
> (Emphasis added.)

See also *Ex parte Deepwater Exploration Co.*, 260 *F.* 2d 546 (5 Cir. 1958) and *Deepwater Exploration Co. v. Andrew Weir Ins. Co.*, 167 *F. Supp.* 185 (E. D. La. 1958) where the Circuit Court of Appeals for the fifth circuit

granted leave to file a petition for a writ of mandamus, but only after the district judge refused to certify the controlling question therein after being given an opportunity so to do by the Circuit Court of Appeals. See also *Humble Oil & Refining Company v. Bell Marine Service, Inc.*, 321 *F.* 2d 53 (5 Cir. 1963).

Petitioners do not suggest that an appellate court should "control the trial judge's exercise of discretion in denying leave for an interlocutory appeal", *Hirsch v. Bruchhausen*, 284 *F.* 2d *supra*, at 786, but they do unequivocally assert that a writ of mandamus should promptly issue in the rare case in which a trial judge has clearly abused his discretion. That is the function of the writ. There is no sound reason for treating a clear abuse of discretion in this area differently from a clear abuse of discretion in any other area.[4]

Judge Skelly Wright had occasion to review the situations in which a writ of mandamus would lie, and the factors to be considered by an appellate court in the exercise of its discretion on a petition seeking the issuance of such a writ. In *Morrow v. District of Columbia*, 417 *F.* 2d 728, 736-737 (C. A. D. C. 1969), he observed:

> "The appellate court issues the writ in two classic situations: where the lower court has acted without jurisdiction or power, or *where the lower court has clearly abused its discretion.*
>
> • • •
>
> "*Among the factors to be considered are* whether the matter is of 'public importance', *whether the policy against piecemeal appeals would be frustrated*

4. For example, a writ of mandamus will issue when a trial judge clearly abuses his discretion by denying a motion to transfer a civil action to another district under 28 *U. S. C.* § 1404(a).

> whether there has been a willful disregard of legislative policy, *and whether refusal to issue the writ may work a serious hardship on the parties.*"
>
> (Citations omitted; emphasis added.)

In the case at bar, it seems self-evident that a writ of mandamus should issue. Consistent with the requirements of 28 *U. S. C.* § 1292(b), petitioners have shown that the question before respondent involved a controlling question of law, the immediate appeal of which could materially advance the ultimate termination of the litigation. The difference of opinion with respect to the controlling question of law was created by respondent's decision, not by any confusion or difference of opinion in the prior case law. In addition, respondent had no special knowledge of facts which could have a bearing upon the exercise of his discretion. Indeed, respondent's decision was totally predicated upon his analysis and understanding of purely legal theories: the relationship between standing, on the one hand, and unclean hands and *in pari delicto*, on the other hand.

It is respectfully contended that the extraordinary circumstances presented by the case at bar mandate the issuance of a writ of mandamus to compel respondent to include in his order the language contemplated by 28 *U. S. C.* § 1292(b) so that petitioners can seek leave to file an interlocutory appeal with the United States Court of Appeals for the Third Circuit.

CONCLUSION.

Petitioners believe that respondent has clearly abused his discretion by refusing to dismiss the private antitrust action brought by NADP and by failing to reconsider the matter or include in his order the language contained in 28 *U. S. C.* § 1292(b). Based upon the aforesaid argument, it is respectfully demanded that a writ of mandamus issue, in the alternative and in order of preference, directing respondent to (a) issue an order dismissing the private antitrust action brought against petitioners by NADP on the ground that NADP is without standing under Sections 4 and 16 of the Clayton Act, 15 *U. S. C.* §§ 15 and 26; (b) reconsider the motion to dismiss the aforesaid private antitrust action on the issue of standing alone, and not on the issue of unclean hands; or (c) incorporate in his order the language required by 28 *U. S. C.* § 1292(b) so that petitioners can seek leave to file an interlocutory appeal with the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ARTHUR MEISEL,
HERBERT F. MOORE,
JAMIESON, MCCARDELL, MOORE, PESKIN AND SPICER,
A Professional Corporation
Attorneys for Petitioners.

Appendix.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MERCER COUNTY

DOCKET NUMBER C-2256-74

NEW JERSEY DENTAL SERVICE PLAN, INC., a not-for-profit corporation of the State of New Jersey,
Plaintiff,

v.

NORTH AMERICAN DENTAL PLANS, INC., a Pennsylvania corporation, and NORTH AMERICAN DENTAL PLANS, INC., a New Jersey Corporation and JAMES J. SHEERAN, Commissioner of the Department of Insurance of the State of New Jersey,
Defendants.

State House Annex
Trenton, New Jersey
April 30, 1976

Before: HONORABLE SAMUEL D. LENOX, JR., J.S.C.

COURT'S ORAL OPINION.

APPEARANCES:

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Attorneys for the Plaintiff
BY: ARTHUR MEISEL, ESQ.

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BY: PETER R. THORNDIKE, ESQ.

WILLIAM F. HYLAND, ESQ.
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Commissioner of the Department of Insurance
of the State of New Jersey
BY: WESLEY CALDWELL, ESQ.
Deputy Attorney General

THE COURT: This matter has been presented to the Court on cross-motions by all parties for summary judgment. Although there are two cases pending involving identical issues, no formal consolidation order has been entered. The legal issues in both cases have been framed by a Pretrial Order entered in but one of them. In that case, New Jersey Dental Service Plans, Inc., a New Jersey nonprofit corporation, is the named plaintiff, and in that Complaint plaintiff has named in addition to the two corporate defendants, the Commissioner of the Department of Insurance for the State of New Jersey as a nominal defendant. In the other case, the Commissioner of the Department of Insurance is plaintiff and his complaint names the same corporate defendants and asserts the same cause of action.

In the Pretrial Order entered in the New Jersey Dental Service Plans, Inc., case, various stipulations of facts were recited and the issues were framed in detail. It was the opinion of counsel and the Court that no benefit would be obtained from a pretrial order in the other case, in view of the identity of the factual and legal issues in the two cases. Thus the Court has before it a motion for summary judgment by plaintiff, New Jersey Dental Service Plans, Inc., a cross-motion for summary judgment by the defendant corporations and a separate motion for summary judgment by the Commissioner of Insurance, both as plaintiff in the

one case and as defendant in the other. All motions involve the same issues and the decision thereon will be equally effective in both cases. I have received from counsel the benefit of exhaustive research and counsel are to be commended for the diligence with which they have pursued this matter and the excellence of both their written and oral presentations. At last count, I have received from counsel 10 briefs, supplemental briefs and reply briefs; six from plaintiff, three from defendant and one from the Commissioner.

Earlier in the course of this litigation, when the only case pending was that filed by New Jersey Dental Service Plans, Inc., a question regarding the standing of plaintiff to maintain this action was raised by defendants. The issue was presented to the Court on motion for summary judgment and resolved favorably to plaintiff. However, this issue is now moot by reason of the institution of the companion action by the Commissioner of Insurance, who admittedly has standing to assert the cause of action found in both complaints.

This matter involves an action by plaintiff, New Jersey Dental Service Plans, Inc. [hereinafter plaintiff], a nonprofit corporation of the State of New Jersey doing business in this State as a dental service corporation organized under the *Dental Service Corporation Act of 1968, N. J. S. A.* 17:48C-1 *et seq.* The action has been instituted against two corporate defendants each bearing the same name, North American Dental Plans, Inc., organized and existing under the laws of the State of New Jersey and the Commonwealth of Pennsylvania respectively, and, as previously indicated, also instituted against the defendant Commissioner of the Department of Insurance for the State of New Jersey as a nominal defendant only to permit his participation.

In its complaint plaintiff alleges that each corporate defendant is operating a dental service plan in New Jersey without holding a certificate of authority from the Commissioner of Insurance which plaintiff alleges constitutes a violation of the aforementioned statute under which plaintiff is organized. Specifically, plaintiff alleges that defendants are soliciting and contracting with labor unions and other subscribers on a prepaid capitation or reduced-fee basis to provide designated dental services. Plaintiff complains that since the corporate defendants are not burdened by the statutory requirements of a dental service corporation, they enjoy an unfairly competitive position to plaintiff. As evidence of this, plaintiff alleges interference and disruption with its business, monetary damage and irreparable harm on the basis of which it seeks judgment declaring the corporate defendants to be illegally engaging in the activities of a dental service corporation in violation of the statute and further seeks judgment for injunctive relief prohibiting the corporate defendants from continuing to do so.

The status of the parties has been stipulated in the pretrial order. The two corporate defendants are corporations organized for profit under the laws of their respective states of incorporation, plaintiff is a nonprofit corporation organized pursuant to the foregoing statute, and the Commissioner of Insurance is joined as a nominal defendant. Plaintiff alleges and defendants deny that in order for defendants to engage in New Jersey in the type of activities in which they are engaged they must comply with the requirements of the *Dental Service Corporation Act of 1968, N. J. S. A.* 17:48C-1 *et seq.* In this connection the parties have stipulated that if the statute is applicable to defendants they are not in compliance therewith. Among the statutory requirements with which defendants have not complied are, that the activities may be conducted only by a nonprofit corporation rather than a corporation organized with capital stock, that the corporation must hold a New Jersey Certificate of Authority from the Commissioner of Insurance, that it must have a Board of Trustees of a number and composition required by the statute, and that it must have furnished to the Commissioner of Insurance a certificate stating the terms and conditions of any contracts entered into by it, as well as a Form of Subscription Certificate, a full schedule of rates to be paid by subscribers, copies of any proposed agreements to be entered into between the corporation and any participating dentists, and a Statement of Financial Condition on an annual basis. Thus the issue is whether the statute is applicable to defendants but not whether they have violated the statute if their activities are found to be encompassed by the statutory requirements.

Paragraph 7 of the pretrial order recites 18 issues letters "A" through "R" inclusive. However, they may be categorized into three groups. First, defendants assert the inapplicability of the statute to their activities. This issue is stated in paragraph 7(B) and within it are subsumed issues 7(C) through 7(F) inclusive. Those issues are stated as follows:

> 7(C) "Whether either of the defendants either orally or in writing contract with subscribers such as unions or other groups for the providing of the plan pursuant to which dental services are to be provided."
>
> 7(D) "Whether either of the defendants either orally or in writing contract with dentists for the performance of dental services in New Jersey."
>
> 7(E) "If so, in so contracting are the defendants or either of them acting as principal on their own behalf or as agent for the subscriber group."

7(F) "Whether either of the defendants are soliciting subscribers in New Jersey in connection with the marketing of a dental service plan."

If it is determined upon consideration of these issues that the statute is not applicable to defendants, the remaining issues are moot. If the statute is applicable then the second category of issues must be considered. These issues relate to the constitutionality of the statute under the *First Amendment* and *Fourteenth Amendment* to the *United States Constitution*, and also *Article* I, *paragraph* I, *Article* I, *paragraph* C, and *Article* IV, *section* 7, *paragraph* 9 of the *New Jersey Constitution*. Finally, the third category involves the issue raised by defendants that even if the statute is constitutional defendants are exempt from statutory coverage by the provisions of *N. J. S. A.* 17:48C-34. With the exception of one factual dispute the parties agree there is no genuine issue as to any material fact challenged. *Rule* 4:46-2. I find this to be graphically demonstrated by a comparison of the factual and legal contentions of the parties set forth in paragraphs 3 and 4 of the pretrial order. The pretrial order provides that the parties are bound by these contentions and that no variation therefrom will be permitted. I have prepared the following recitation of facts entirely from the contentions of the parties as contained in the pretrial order and included therein all of the substance of the contentions of both plaintiff and defendants. The facts as capsulized are as follows:

The corporate defendants are for-profit corporations organized and existing under the laws, respectively, of the Commonwealth of Pennsylvania and the State of New Jersey. Said defendants offer their services to assist union welfare funds and other groups in the design and administration of dental plans which are established by the welfare funds and other groups for the benefit of eligible

members in accordance with collective bargaining agreements reached between management and labor. The defendant corporations design, market and administer plans pursuant to which services are provided to subscribers on a prepaid capitation basis. On behalf of the welfare funds or other group, as fund administrator, defendants contract with dentists licensed in New Jersey to render services to the eligible members of the union in accordance with the provisions of the dental program established by the union welfare funds or other groups for their members. Person eligible by contract to receive dental services are entitled to receive certain specified dental services at no further cost, and to receive additional dental services at stated membership fees. Pursuant to such contracts entered into by the corporate defendants in this and other states, eligible persons are receiving dental services in the State of New Jersey. Paid services are rendered by persons licensed to practice dentistry in this State pursuant to the terms of an agreement between each dentist and the corporate defendants by which each dentist agrees to provide dental services to eligible members of unions and other groups which have contracted with the corporate defendants. The dentists are paid by the union or other groups through the defendants. The participating dentists receive either a negotiated lump sum payment or a capitation payment for each person assigned to his office and, in addition, a surcharge fee for certain specified dental services designated in the particular plan. The surcharge fee is established by the corporate defendants as a result of their negotiations with the unions or other groups. Defendants receive reporting information from the dentist rendering services to the union or other group members, indicating the manner in which the program is being utilized. They also gather the reporting information for all dentists rendering services under the dental program established by the welfare fund

or other group and provide utilization reports to the fund trustees showing program utilization. They further serve as a reporting conduit to the trustees with regard to union member complaints. Defendants receive an administration fee from the welfare fund or other group for services performed.

Defendants do not argue that there exists any substantial difference between the activities in New Jersey of the New Jersey corporation and those of the Pennsylvania corporation which would render the activities of the Pennsylvania corporation lawful even if the activities of the New Jersey corporation violate the statute. Accordingly, I will deal with the question of the activities of the New Jersey corporation only and will henceforth refer to defendants in the singular rather than the plural. Considering the facts as they have just been synopsized, as I understand the contentions of the parties that synopsis contains only one area of factual dispute. That relates to the issue of whether defendant in contracting with dentists is acting "on behalf of the welfare fund as fund administrator," whether "dentists are paid by the union through the defendant" and whether defendant "receives an administration fee from the welfare fund for its services," all indicating the existence of an agency relationship as defendant contends, or whether as plaintiff contends the contrary is true and defendant is acting as principal contracting for its own account. This issue could be a crucial one. For plaintiff admits that the unions could themselves contract for dental services to be performed for their members and not be in violation of the statute. Since the unions could do so directly, it is my finding that they could also do so indirectly by an agent wholly-owned subsidiary, employee or other fiduciary representative. Therefore, should I find defendant was contracting merely as agent for the union, I will necessarily find no violation of the statute.

I shall first consider the issue of the applicability of the statutory requirements to defendant's activities on the basis on an assumption that defendant in contracting as it does with dentists for the performance of dental services is acting on its own behalf as a principal rather than as agent for the subscriber group. Upon a determination of this issue I shall return to the issue of agency.

The function of the Court is to determine the legislative intent in the enactment under review. In my judgment the statutory language is clear and unambiguous and I find no necessity to go beyond that language in performing my judicial function. The *Dental Service Corporation Act* of 1968 was enacted to permit the establishment, maintenance and operation of dental service plans in the public interest, and to provide for regulation of those dental service plans by the Commissioner of Insurance. A reflection of legislative intent is found in the title of the statute which reads: "An act to stimulate and encourage improvements in the dental health of the public and providing means for the development and operation of plans to achieve the same." And more particularly, in the first section of the statute entitled "Objects and Purposes" the Legislature expressed its intent "to establish, maintain and operate a nonprofit dental service plan or plans in the public interest whereby dental care may be provided to individuals either singly or in groups to become subscribers thereto; and in furtherance thereof to enter into contracts with duly licensed dentists whereby such dentists agree to provide such dental care to its subscribers." Obviously, the Legislature saw the need for an alternate dental health care system in New Jersey and therefore granted to the Commissioner of Insurance broad regulatory powers in order to insure that plans established under statutory authorization would conform to the statutory

requirements and be operated in a manner beneficial to and not hazardous to the public.

Two requirements of the statute are immediately apparent upon a reading of the first section. The statute requires that dental service plans be nonprofit and that they be operated in the public interest. In furtherance of the stated purpose the statute provides that no one may engage in the "activity" regulated by the statute unless "organized and authorized" to do so under the statutory terms and provisions. *N. J. S. A.* 17:48C-34. The form of organization permitted by the statute to operate dental service plans is that of a corporation organized without capital stock and not-for-profit. *N. J. S. A.* 17:48C-2; *N. J. S. A.* 17:48C-3; *N. J. S. A.* 17:48C-4. The "authorization" to operate a dental service plan is effected by the issuance of a certificate of authority by the Commissioner of Insurance. *N. J. S. A.* 17:48C-2(a)(2); *N. J. S. A.* 17:48C-4. The Commissioner may issue such a certificate only if the "corporation is organized without capital stock and not for pecuniary profit and has complied with the requirements of this Act," and if "its conditions or methods of operation are not such as would render its operations hazardous to the public or its subscribers . . ." *N. J. S. A.* 17:48C-4. Obviously, the Legislature sought to provide low-cost dental service to the public through the medium of dental service plans under broad powers delegated to the Commissioner of Insurance to supervise such plans in the public interest to avoid dangers which might otherwise result from unrestricted authorization for their operation.

Defendant is a dental service corporation. That it is not "organized, without capital stock, and not for profit" and does not hold "a certificate of authority issued under this Act" does not, as defendant contends, remove defendant from the definition of "dental service corporation" in *N. J. S. A.* 17:48C-2(a). For those are requirements

for the operation of a dental service corporation found elsewhere in the statute, and are not intended to be limitations in the sense that the statute does not regulate corporations operated for profit or operating without a certificate of authority. Merely to state defendant's argument to that effect is to deny it. Defendant falls within the confines of the balance of the definition which states that the corporation is one organized "for the purpose of establishing, maintaining and operating a . . . dental service plan, whereby the expense of dental services to subscribers and other covered dependents is paid in whole or in part by the corporation to participating dentists . . . in return for premiums or other valuable considerations . . ." Thus, it is at once apparent that defendant is a dental service corporation acting in noncompliance with the statutory requirements. Defendant argues that the statute regulates non-profit dental service corporations. This is convoluted logic. The statute regulates an *activity*, not a corporation, and directs that such activity may be conducted only by a non-profit corporation holding a certificate of authority issued under the statute. The activity so regulated is the establishment, maintenance and operation of a program described in Section 1 and Section 2(a) of the statute as recited hereinbefore.

A copy of defendant's contract submitted to the Court as a sample "Dental Care Benefits Agreement" itself establishes that defendant's function under the contract "is to provide or cause to be provided . . . (dental) services and facilities . . ." While not provided for a "premium," such services are provided for "other valuable considerations" within the language of Section 2(a) of the Statute. Under the contract the dental services are provided at facilities listed in the contract or other comparable facilities and the subscribing group pays a specified sum on a monthly basis

for the performance of said services to group members at those facilities. There is no dispute that defendant designs and administers its plan on a prepaid capitation basis and that it contracts with dentists to provide services for the group. Those services are available to eligible group members and, if applicable, to the family of such member. Unless defendant is acting as agent for the group, a question hereinbefore reserved, it is patent that defendant by its contract renders itself liable to the "subscriber" and the "covered dependent" within the definitions of those terms found in *N. J. S. A.* 17:48C-2(b) and (c). This activity was described by Joseph R. Cusssumano, president of defendant, in his oral deposition taken and filed in the cause as "exactly the same as Blue Shield and Blue Cross does." There can be no doubt that the statute was designed to regulate such activities.

It follows that it is illegal for defendant to engage in such activities while in non-compliance with the statute. The language of *N. J. S. A.* 17:48C-34 is clear and unambiguous:

> "No person, association or corporation shall engage in any activity provided for in this Act unless organized and authorized in accordance with its provisions . . ."

Simply stated, the statute undertakes to authorize a new method of dental health care delivery not otherwise permitted under the laws of New Jersey or the United States, to provide regulation of that activity, and to forbid the conduct of that activity except by a corporation authorized pursuant to and acting in compliance with the statutory requirements.

Thus, as previously stated, clearly the State has restricted the contracting of dental service plans to nonprofit corporations operated for the sole benefit of the subscribers.

The statute under review is virtually identical to the "Medical Service Corporations Act," *Laws* of 1940, *Chapter* 74, *N. J. S. A.* 17:48A-1 *et seq.* which provides for the organization and regulation of medical service corporations. In discussing this statute Chief Justice Weintraub observed:

> "A plan may be offered only by a 'corporation organized without capital stock, and not for profit,' *N. J. S. A.* 17:48A-1, so that no third party may profit from a plan." *Group Health Ins. of N. J. v. Howell,* 43 *N. J.* 104, 117 (1964) (dissenting opinion).

Defendant does not dispute its profit-making object but argues that the legislative intent was to encompass within the statutory provisions only dental service plans of the nature of an indemnity insurance policy. Facially persuasive arguments to this effect have been presented, particularly in the citation of *Jordan v. Group Health Association,* 107 *F. 2d* 239 (C. A. D. C. 1939), and *California Physician's Service v. Garrison,* 172 *P. 2d* 4 (S. Ct. Cal. 1946), both interpreting somewhat similar statutes and holding that they were designed to regulate the business of indemnity insurance and were not applicable to all health service corporations. Suffice it to say that I have read these opinions at length and given consideration to their applicability to the case at bar. However, they are not binding upon this Court, they were written more than thirty years ago in a different social environment, and they relate to different statutes. Admittedly, dental service plans of the nature contracted by defendant are not contracts of insurance in the common sense. "Strictly defined, insurance . . . is a contract whereby one for a consideration agrees to indemnify another for liability, damage, or loss by perils to which the subject insured may be exposed." *Couch, Cyclopedia of Insurance Law, Volume* I, *Section* I.

The element of indemnity as such is absent from defendant's contract, but the element of risk is not. Defendant argues that in the absence of a risk taken by defendant there can be no insurance. But the assumption of the risk is still present. The risk sought to be eliminated in both a dental service plan and an indemnity insurance contract is the risk to the subscriber or patient of a loss requiring payment of medical expenses. In both instances this risk is eliminated, in the indemnity contract being assumed by the insurer and in the dental service plan being assumed by the dentists with whom the dental service corporation contracts. While this is a distinction, it is one without significance with regard to legislative concern, for there are public hazards involved in both. The concern of the Legislature is with the public interest. It is the risk to the public which is being eliminated for a fee. The Legislature, under general insurance laws, has long regulated the traditional indemnity insurer in the medical and dental fields. By separate legislation it has authorized a variety of medical health service corporations, to wit, the Hospital Service Corporations Act, *N. J. S. A.* 17:48-1 *et seq.*, the Medical Service Corporations Act, *N. J. S. A.* 17:48A-1 *et seq.*, and the statute here under review. In creating "dental service corporations" the Legislature has in turn simply regulated their existence. Nowhere in the statutory language is there confirmation of defendant's contention that the Legislature intended only to regulate dental service plans providing indemnity insurance. The statute by its terms regulates dental service corporations as defined therein and the activities thereof as defined therein. Defendant clearly falls within the purview of the statutory language. Defendant's efforts to hide behind the indemnity insurance argument is a futile one in view of this statutory language. The major thrust of defendant's argument is that an examination of the requirements of the statute confirms that the purpose

and concern of the Legislature was to regulate organizations which in effect were insurers. Defendant cites *N. J. S. A.* 17:48C-4 which provides that authorization for the dental service corporation is to be sought from the Commissioner of Banking and Insurance. And, in the same context defendant argues that the fact that the law is found in Title 17 of the New Jersey Statutes indicates its insurance concept. But this argument must fail when the nature of the regulated dental service plans is considered for clearly they are in the nature of insurance, albeit not in the traditional indemnity form. Indeed, the Blue Cross and Blue Shield programs while not in all respects identical to defendant's plan, are themselves not entirely the traditional form of insurance. More effective is the argument that defendant's activities do not constitute the traditional business of indemnity insurance within the contemplation of the general insurance laws, and might be expected to be governed in all respects by a separate statute creating dental service corporations. In *Group Health Insurance of New Jersey v. Howell*, 40 *N. J.* 436 (1963), modified on other grounds, 43 *N. J.* 104 (1964), the Court discussed the unique nature of service corporations in the context of the medical statute as follows:

> "The basic distinction between medical service corporations and ordinary health and accident insurers is that the former undertake to provide prepaid medical services through participating physicians, thus relieving subscribers of any further financial burden, while the latter only undertake to indemnify an insured for medical expenses up to, but not beyond, the schedule of rates contained in the policy. The ordinary health and accident insurer makes no attempt to provide medical services as such. The primary purposes of a medical service corporation, however, is an un-

> dertaking to provide physicians who will render services to subscribers on a prepaid basis."

Thus, the distinction which the Legislature confronted in the enactment of this statute was not that relating to the presence or absence of the indemnity insurance feature but rather the presence of a health service corporation as opposed to an ordinary health and accident insurer. *Cf. N. J. Association of Independent Insurance Agents v. Hospital Service Plan of N. J.*, 128 *N. J. Super.* 472 (App. Div. 1974), reversed on other grounds, 68 *N. J.* 213 (1975), *State v. Community Health Service, Inc.*, 129 *N. J. L.* 427 (E. & A. 1943).

Defendant further argues that *N. J. S. A.* 17:48C-25 in limiting the investments of funds by a dental service corporation to investments "in accordance with the requirements now or hereafter provided by law for the investment of funds of life insurance companies," and requiring the accumulation and maintenance of a $100,000 contingent surplus fund, and *N. J. S. A.* 17:14C-21 in requiring experience rating and other "insurance type" statutory requirements in the statute demonstrate a legislative intent to govern only indemnity insurance corporations. This argument fails to consider the statutory purpose. The public thinks of dental service plans of the nature marketed by defendant as providing insurance coverage and the Legislature has the right to regulate them as such. Whether it be indemnity insurance or some other form, the fact is that intimately involved therein is the public interest in which the Legislature has directed that dental service plans be operated. Having chosen to create and regulate such corporations it is natural the Legislature would include in its enactment protective provisions for the public welfare. Such protection is appropriate not only in the case of indemnity insurers for, although payments are made on a monthly basis in payment of services to be rendered rather than in payment of a contract for indemnification, public hazards still exist. The solvency of the dental service plan, security for its continued existence, continued availability of the dental services required to be performed, the fidelity of the corporation and the integrity of its contract are all matters of legitimate concern to which the statutory provisions may be directed. The necessity and wisdom thereof are a matter for the Legislature not the court as long as a legitimate relationship exists. I find the danger to be real and the means of accomplishing the end of protection to be legitimate. The statute encompasses both dental service plans based upon the indemnity insurance principle and those, such as defendant's plan, which are based upon the direct payment principle. The legislature has merely found it appropriate to require similar protection in both instances. The distinction between service corporations and indemnity corporations is not so great as to render the statutory requirements inapplicable to both.

Defendant further argues that *N. J. S. A.* 17:48C-12 describes an indemnity-type contract. That section provides:

> "Any dental service corporation may enter into agreements with eligible dentists . . . and may make to such dentists such payments *as shall have accrued by reason of services required to be performed under the plan.*"
> [Emphasis supplied.]

Defendant contends that this contemplates that the corporation will pay each participating dentist upon receipt of a claim from the dentist evidencing that services have been rendered to a subscriber, and that the subscriber, in turn, will pay only a set annual premium to the corpora-

tion. *N. J. S. A.* 17:48C-7; *N. J. S. A.* 17:48C-14. Thus defendant argues that the dental service corporation contemplated by the statute acts as an insurer, agreeing in return for payment of a set annual premium to assume liability of payment of claims by dentists for specified services performed upon subscribers. I cannot read this statutory language in the limited manner suggested. The statute does not say "performed," it says "required to be performed." And, in any event, this language when read in the light of the entire statute cannot be said to evidence a legislative intent to limit the statutory application to indemnity contracts.

The statute must, of course, be interpreted in the light of the goals sought to be accomplished. Those goals are similar to those sought in the hospital and medical service field. Whether the goals are accomplished by indemnity contracts or service contracts is essentially immaterial to the Legislature, provided adequate protection is afforded in both instances. In discussing this by the context of hospital insurance protection the Court stated in *Borland v. Bayonne Hospital*, 122 *N. J. Super.* 387, 399 (Ch. Div. 1973), aff'd 136 *N. J. Super.* 60 (App. Div. 1975) that:

> "The basic philosophy of Blue Cross has always been that of constant progress toward the goal of complete protection against the unpredictable costs of hospital services for all the people of the community. The goals and objectives of this partnership are (a) to provide to the public a payment-in-advance method for financing care provided by hospitals and to guarantee payment to the hospital; (b) to make hospital care needed by the public financially accessible to the largest number of people at the lowest possible cost; and (c) to help the community carry the social and economic burden created when people

> are unable to pay for the necessary care rendered by hospitals." (Citations omitted.)
>
> "The relationship of the legislative program to these goals is readily apparent from the statutory provisions of the Hospital Service Corporation Act and companion legislation. So, for example, in order to maintain low cost to the public, the statute requires that a hospital service corporation be organized without capital stock and not for profit, (17:48-1); that it be operated only for the benefit of its subscribers (17:48-2); that it be strictly limited to the expenditures for solicitation and administration (17:48-10); that its reserve be low in contrast to commercial carriers (compare 17:48-10 with 17B:19-5); that its investments be strictly limited (17:48-10); and that it be exempt from most taxes (17:48-18)."

As stated, the goal of the Legislature in creating and regulating dental service corporations was to provide low-cost dental service with adequate public protection. Whether this be accomplished by indemnity insurance corporations or service corporations, nowhere appears in the statute to have been a matter of particular legislative concern.

The object of the statute in limiting the issuance of dental service plans to non-profit corporations is to maintain low-cost dental service to the public. To further encourage the promulgation of low-cost dental service plans, the Legislature has provided for tax exempt status in *N. J. S. A.* 17:48C-32, and has exempt the corporations from the restrictive and regulatory provisions of the general dental laws and general insurance laws. Defendant argues that in the light of the intention and purpose of the Legislature as stated in the title of the act "To stimulate and encourage improvements in the dental health of the

public and (provide) means for the development and operation of plans to achieve the same" the statute must be construed as encouraging by not regulating dental service plans operated by for-profit corporations. But this argument ignores a number of other evidences of legislative intent to the contrary. For instance, the Legislature has announced its intention that dental service plans be operated in the public interest, and obviously, if operated for profit such plans would be operated in the private interest of such corporation. Furthermore, there is no prohibition against dental service corporations provided the same comply with the general insurance laws. And there is legitimate reason for the Legislature to find it appropriate to protect non-profit corporations acting in the public interest from the competitive pressures of profit-motivated corporations engaging in the same business. This would be particularly so if such corporations for profit were not subject to statutory regulations. It is entirely unreasonable to attribute to the Legislature an intent to regulate non-profit dental service corporations and permit competitive for-profit corporations to market their plans free of control. The interpretation which I afford to this statute is compatible with the stated legislative purpose aforementioned. It is far more difficult indeed for non-profit dental service corporations which the legislation sought to foster to survive successfully with the present marketing by defendant on an unregulated basis of competitive service plans. As a counter-argument to this defendant argues rhetorically, how can a corporation for profit compete with one which does not have a profit motive? There is possibility that defendant may have to offer contracts at a higher rate to obtain a profit which a non-profit corporation would not require. But there is the equal possibility that the absence of statutory regulation may provide a substantial cost cutting advantage to the for-profit corporation. In any event, it is not the function of this Court to balance the benefits and detriments or consider the wisdom of the Legislature in denying the right to operate a dental service plan to for-profit corporations. If the Legislature has, as I have found, so dictated, its determination cannot be subject to judicial criticism.

In summary then, I find that under *N. J. S. A.* 17:48C-2 defendant is a "dental service corporation" under subsection (a), is contracting with "participating dentists" under subsection (d) for the dentists to provide "dental service" under subsection (e) to "covered dependents" under subsection (c) of "subscribers" under subsection (b). I find that since defendant is admittedly in non-compliance with the activities are illegal. Since it is not a non-profit corporation under Title 15 of the *Revised Statutes of New Jersey* but rather a for-profit corporation under *Title* 14 it cannot even apply for a certificate of authority from the Commissioner of Insurance. *N. J. S. A.* 17:48C-3 even forbids a dental service corporation, which I have stated must be a non-profit corporation, from converting into a corporation organized for pecuniary profit. Accordingly, defendant has but two options if it is to continue to operate dental service plans. First, it may reorganize under *Title* 15 as a non-profit corporation; or, second, it may apply for authorization to act under the general insurance laws.

We come now to the issue of agency which I have reserved for separate consideration. Originally it was my intention to deny all motions for summary judgment on this issue and require the matter to be litigated at a plenary trial. There is a mass of evidence on this subject found in the many depositions and documents submitted to the

Court. To some extent there are varying inferences which can be drawn from different documents and the evidence is both direct and circumstantial. The nature of the relationship between defendant and the labor unions and other groups with which it contracts is described in considerable detail in the depositions of Sidney Crane and Marvin Kaplan. Defendant argues that under the contracts the unions and other groups have the right to direct with which dentists defendant contracts and to require termination of contracts with dentists whose services they determine to be unsatisfactory and to determine the location of the dentists. These, and other rights of control retained by the unions and other groups are alleged to be consistent with an agency relationship and inconsistent with plaintiff's argument that defendant is acting as a principal. The question with which I have wrestled is whether my conclusion that defendant is acting as principal and not agent is based upon evidence of a sufficient quantum as to permit a summary judgment to that effect, or whether that conclusion can only be made as a factual finding on the basis of evidence presented at a plenary trial. However, I have concluded that although within the great mass of evidence which has been presented there can be found certain items of correspondence, documents and statements in testimony which, if isolated from the evidence to the contrary, may be found to constitute minimal circumstantial evidence of an agency relationship, these inferences must be disregarded in the light of the overall evidence. There is no true factual dispute and counsel have not argued otherwise. They each argue with vigor their own conclusions to be drawn from the evidence, but none of them has directed the Court to any specific conflict between witnesses or between witnesses and documents as to the true facts. In other words, I must assume that at trial I would receive the same evidence that has

now been presented to me. It is within the province of the Court on a motion for summary judgment to draw inferences from stipulated evidence, but not to choose between conflicting items of evidence.

Defendant is no more an agent of the union groups with which it contracts than is an insurance company an agent of its insured. Defendant is a "middleman" engaged in a profit-making business. It contracts with dentists to provide services on a prepaid capitation basis and it contracts with union groups to pay a fee to obtain those dental services for union members. Whether it is called a profit or a service fee defendant obtains its compensation by obtaining more money from the union group than is paid to the participating dentists. An agency relationship is a fiduciary relationship, one where a duty of fidelity runs from the agent to the principal. That quality is clearly absent in this relationship. Defendant is no more an agent of the union groups than it is of the dentists with whom it also contracts. Its dealings with the union groups are arm's length dealings where the provisions of the contract are negotiated. This is the converse of an agency relationship where defendant would be negotiating on behalf of the union group. In many instances the facilities to be used and the dentists to provide the dental services are already under contract with defendant when the plan is presented to the union group. How then can defendant be acting as agent for the union group in negotiating with the dentists? A review of the depositions of Drs. Shapiro, Barnes and DeFeo, three of defendant's participating dentists, supplies strong evidence that defendant is acting on its own behalf in contracting with the union groups. President Cussumano testified that there is no question that defendant is marketing a dental program. In other words, defendant does not act on behalf of the union groups in approaching dentists to negotiate for the supplying of

dental services, but rather has "packaged" a dental service plan complete with previously established facilities which it peddles on a competitive basis on the open market to subscriber groups. This is the antithesis of an agency relationship. In a letter to a union local dated May 28, 1973, Leonard J. Alessi, Director of Marketing of defendant presented as a part of its proposal that defendant "is presently providing quality dentistry to more than 60,000 union members and their families," "has seven major dental centers . . . with 14 satellite centers," and "is committed to opening a major center in the Atlantic City area." The proposal continued by offering to the union various forms of plans with different payments and surcharges from which the union might choose. This is not evidence of an agency relationship but of a sales pitch by a business to a potential customer. Defendant conducts a business. It is a profit-making business corporation engaged in the enterprise of marketing dental service plans. There are hundreds of pages in the documents which I have reviewed, and I find no necessity to point item by item to the dozens of major documents which have drawn me to my conclusion. Suffice it to say that the evidence on this issue is overwhelming and the minor inferences to the contrary are insufficient to defeat plaintiff's motion for summary judgment, even when the evidence and all of the legitimate inferences are viewed most favorably to defendant. *Rule* 4:46-2; *Judson v. Peoples Bank and Trust Co. of Westfield*, 17 *N. J.* 67, 73-75 (1954).

I have one further comment before proceeding with the remaining issues. Counsel have labored over the question of whether defendant is providing dental services in New Jersey. The issue was, of course, argued in connection with those aspects of this litigation which I have now decided. However, it has also been tangentially argued in

connection with the question of whether defendant's activities violate the general dentistry statutes. I emphasize that the issue before me is whether the conduct of defendant violates the *Dental Service Corporation Act of 1968* only, and is not whether this conduct violates any other statute and particularly the statute regulating the practice of dentistry. Neither plaintiff's complaint nor the pretrial order frames such an issue. The regulation of the practice of dentistry in New Jersey is governed by *N. J. S. A.* 45:6-1 *et seq.* and that statute is administered by the New Jersey State Board of Dentistry. I have been led to understand that this question has been the subject of a hearing and adjudication before the New Jersey State Board of Dentistry, delivered February 11, 1976, and may also be the subject of further legal action to be instituted. But this is a matter for another day and forms no part of my consideration in this case.

Defendant next asserts that the *Dental Service Corporation Act of 1968* arbitrarily and irrationally discriminates between for-profit corporations and non-profit corporations by authorizing only the latter to operate dental service plans. Defendant argues that this classification is constitutionally defective as violative of the equal protection and due process guarantees of the *New Jersey Constitution* and the *United States Constitution* and further as constituting special legislation in contravention of *Article* IV, *sec.* 7, *para.* 9 of the *New Jersey Constitution.*

It is axiomatic that there is a strong judicial presumption that a statute is constitutional. *Male v. Renda Contracting Co., Inc.*, 64 *N. J.* 199, 201 (1974), cert. den. 419 U. S. 839, – S. Ct. –, – L. Ed. 2d – (1975); *Inganamort v. Fort Lee*, 120 *N. J. Super.* 286, 301 (Law Div. 1972), aff'd 62 *N. J.* 521 (1973); *Toms River Affiliation v. Dept. of Environmental Protection*, – *N. J. Super.* –

(App. Div. 1976). Before the Court may declare unconstitutional an act of the Legislature its repugnancy to the Constitution must be clear beyond a reasonable doubt, *Brunetti v. Borough of New Milford*, 68 *N. J.* 576, 599 (1975); *Gangemi v. Berry*, 25 *N. J.* 1, 10 (1957), and defendant bears a heavy burden in its attempt to disprove the presumed validity thereof. *Harvey v. Essex Cty. Bd. of Freeholders*, 30 *N. J.* 381, 388 (1959); *Yellow Cab Co. of Camden v. State*, 126 *N. J. Super.* 81, 94 (App. Div. 1973), cert. den. 64 *N. J.* 498 (1974); *Van Ness v. Borough of Deal*, — *N. J. Super.* —, — (Ch. Div. 1975).

The constitutional prohibition against special legislation reads in pertinent part:

> "The Legislature shall not pass any private, special or local laws . . .(8) Granting to any corporation, association or individual any exclusive privilege, immunity or franchise whatever."

N. J. Const. 1947, *Art.* IV, *sec.* 7, *par.* 9. In determining whether a statute is special legislation the oft-stated function of the judiciary is that:

> "In deciding whether an act is general or special, it is what is excluded that is the determining factor and not what is included. If no one is excluded who would be encompassed, the law is general. Another requirement of a general law is that it must affect equally all of a group who, bearing in mind the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves." *Harvey v. Essex County Bd. of Freeholders, supra* at 389.

See also *City of Bayonne v. Palmer*, 90 *N. J. Super.* 245, 284 (Ch. Div. 1966), aff'd 47 *N. J.* 520 (1966). The Court

must examine the deferential treatment accorded by the statute to non-profit corporations and determine whether it is reasonable in light of the legislative objective, *Kline v. N. J. Racing Commission*, 38 *N. J.* 109, 118 (1962). As hereinbefore stated, the purpose and intent of the Legislature in enacting the statute under review was to provide public protection by regulating suppliers of dental service plans so as to guarantee the integrity and the continued existence and availability of promised dental services. Viewing the statutory language in light of this legislative objective, it is clear that the legislative concern to provide satisfactory and reliable dental service plans at the least possible cost to the consumer affords a reasonable basis for the exclusion of for-profit corporations from the field. The Legislature may reasonably conclude that for-profit corporations cannot supply identical plans as inexpensively and effectively as non-profit business entities. Thus the classification under review rests upon an apparently rational factual basis, *Meadowlands Regional Dev. Agency v. State*, 112 *N. J. Super.* 89, 102 (Ch. Div. 1970), aff'd 63 *N. J.* 35 (1973). Defendant may dispute the validity of such a legislative judgment but the Court, being obligated to accept such judgment if it can be ascribed to any rational basis whatsoever, may not do so in the performance of its circumscribed judicial function. *Pierro v. Baxendale*, 20 *N. J.* 17, 21 (1955). Since the exclusion of for-profit corporations is based upon a legislative judgment with a factual basis and is rational when viewed in light of the legislative objective, I find the classification to be general and therefore that the statute does not offend the special legislation prohibition of the *New Jersey Constitution*.

Defendant also argues that the Act contravenes the equal protection and due process guarantees of the *New*

Jersey and *United States Constitutions.* In determining whether a statute denies equal protection of the laws the test is essentially the same as that which determines whether it constitutes special legislation, *Robson v. Rodriquez*, 26 *N. J.* 517, 526 (1958), and

> "A statute does not violate due process or equal protection so long as the classification or discriminatory treatment effected thereby has some reasonable basis, is fairly related to a legitimate legislative purpose, and may be justified upon any state of facts reasonably conceived. [Citations omitted]." *Snedeker v. Bd. of Review, Div. of Employment Security*, — *N. J. Super.* —, — (App. Div. 1976).

See also *Wilson v. City of Long Branch*, 27 *N. J.* 360, 377 (1958).

As has already been demonstrated, the legislative concern with ensuring the availability and integrity of economical dental service plans suffices as a demonstrable rational basis justifying discrimination against for-profit corporations. Our courts have accorded the Legislature broad discretion in the area of permissible classification, *Passaic v. Consolidated Police, etc., Pension Fund Commission*, 18 *N. J.* 137, 146 (1955), and a classification will be presumed to rest upon a rational basis if there be any conceivable state of facts which would afford reasonable support for them, *Robson v. Rodriquez, supra* at 524; *Wurtzel v. Falcey*, — *N. J.* — (1976). The desire of the Legislature of assuring adequate public dental care is a proper reaction to a legitimate public need. Such a statute is a valid exercise of the police power "so long as the means adopted are not arbitrary and are reasonably related to the felt public need," *N. J. Chapt., Am. Inst. Planners v. N. J. State of Prof. Planners*, 48 *N. J.* 581, 600 (1967), app. dis., *cert.* den. 389 *U. S.* 8, 88 *S. Ct.* 70, 19 *L. Ed. 2d* 8 (1967).

Applying the foregoing to the *Dental Service Corporation Act of 1968*, I find that the Act does not violate the guarantees of equal protection or due process under the *New Jersey* and *United States Constitutions*, and further that the Act is a legitimate legislative response to a public need and hence a valid exercise of the police power.

My determination that the Act constitutes a valid exercise of the police power eliminates the necessity for me to consider defendant's contention that the Act deprives it without due process of law of its property right to engage in the business of offering dental service plans. While a statute which unreasonably denies or curtails the common right to engage in a lawful business constitutes a denial of due process, *Lakewood Express Service v. Bd. of Public Utility Commissioners*, 1 *N. J.* 45, 50 (1948), a statute conversely may deny or curtail such a right "provided that the public interest to be promoted sufficiently outweighs in importance the private right which is impaired." *Rothman v. Rothman*, 65 *N. J.* 219, 225 (1974); *Toms River Pub. Co. v. Borough of Manasquan*, 127 *N. J. Super.* 176 (Ch. Div. 1974). The need of the public for adequate, dependable and economical dental service outweighs the right of a business entity to offer such dental service plans for profit. *Cf. Borland v. Bayonne Hospital*, wherein the Chancery Division noted that *N. J. S. A.* 17:48-1 *et seq.*, the *Hospital Service Corporations Act*, constitutionally required subject service corporations to be organized not for profit. The *Dental Service Corporation Act* is essentially identical to *N. J. S. A.* 17:48-1 *et seq.* and must be similarly upheld upon a judicial balancing of private right and overwhelming public need. Consequently, the Act does not deprive defendant of its right to offer dental service plans without due process of law.

Defendant's further contention that the Act violates its rights under the *First Amendment* to the *United States*

Constitution has not been briefed, and in accordance with the Pretrial Order will not be considered.

Defendant's final contention is that if, as I have now found, its activities are otherwise subject to the statutory requirements and the statute is constitutional, its activities are exempt from state regulation by reason of the provisions of *N. J. S. A.* 17:48C-34. This section of the statute reads in pertinent part:

> "No . . . corporation shall engage in any activity provided for in this Act unless organized and authorized in accordance with its provisions; but this shall not . . . apply to any arrangement or activity which is *subject to regulation under* other applicable law of this State or of the United States." [Emphasis supplied.]

Defendant urges the applicability of this statutory exemption to its activities by reason of the provisions of the *Employee Retirement Income Security Act*, 29 *U. S. C. A.* 1007 *et seq.* The thrust of defendant's argument is that its activities are "*subject to regulation under*" this law of the United States and so is exempt from state regulation.

It is at first noteworthy that although defendant claims to be exempt because it is subject to regulation under this federal statute, defendant nowhere has established nor has it even alleged that it is acting in compliance with the statute. The good faith of defendant in asserting this claim is thus suspect. For this statute, which became effective on September 2, 1974, contains in the regulatory provisions of Subtitle B extensive requirements to be performed by any "employee benefit plan" covered by the statutory section 1003. Nowhere does defendant allege that it has filed a summary of its dental service plans and published and filed its annual report with The Secretary of Labor, nor that its plans comply with the participation and vesting requirements of the federal law, nor that its plans satisfy the benefit accrual requirements, the minimum funding standards, the fiduciary responsibility requirements or any of the many other requirements imposed upon a corporation such as defendant which is "subject to regulation under" this federal law.

Obviously, the reason for this is the simple answer to defendant's claim of exemption, and that is that defendant is not subject to regulation under the federal statute.

Defendant's claim is based upon the provisions of 29 *U. S. C. A.* 1144 which provides, with stated exceptions, that the federal statute "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) . . ." Therefore, whether the issue is approached from the exemption section of the State law or the supersedure section of the federal law, the issue is whether the activities of defendant are covered by the "*Employee Retirement Security Act* of 1974". An examination of the statute establishes without doubt that defendant's claim of exemption is without merit. 29 *U. S. C. A.* 1002(1) defines an "employee benefit plan" as any plan which is "established or maintained by an employer or by an employee organization, or by both" for the purpose of providing to employees through insurance or otherwise medical-type benefits. Defendant is neither an "employer" as defined in Section 1002(5) nor an "employee organization" as defined in Section 1002(4). It is noteworthy in passing that in Section 1001 of the statute which encompasses the congressional findings and declaration of policy which motivated the enactment of the law, Congress set forth its intent to regulate employee benefit plans and "the activ-

ities of their participants, and the employer's, employee organizations, and other entities by which they are established or maintained . . ." This introductory language in the first section of the law might indicate an intention to subject to regulations entities such as defendant, but the policy statement to this extent was not carried forward into the coverage provisions, for clearly defendant is not an "employee benefit plan" under Section 1002(1).

This issue has in substance been decided by my determination on the agency question. Since I have already decided that defendant is not acting as agent for the welfare plans and other groups with which it contracts but is acting as principal on its own behalf, it cannot claim to be marketing an "employee benefit plan." The obvious intention of Congress was to exempt from the application of State insurance laws employer or employee organizations which make available employee benefit plans to eligible participants. It was not intended to encompass a for-profit business regularly engaged in the marketing of dental service plans or dental indemnity plans. Having determining that defendant is not acting as agent on behalf of the union groups, it follows that defendant is no more free from State regulations than is the Hospital Service Plan of New Jersey which markets Blue Cross, the Medical-Surgical Plan of New Jersey which markets Blue Shield, or any other indemnity insurance carrier writing group health insurance for employers or labor unions. Defendant is not an employer or an employee organization, but is an independent profit-making corporation contracting in a business relationship with such employers or employee organizations. As such, defendant is not entitled to exemption under the New Jersey statute.

It is apparent to me that defendant may well be able to come within the statutory exemption and avoid the

consequences of this judgment by a restructuring of its operations and contracts and I recognize the probability that if this judgment which I render today is sustained on appeal defendant will attempt to effect compliance by establshing itself as an agent representing the welfare fund or other group in contracting for a dental service plan. I would not anticipate that defendant will attempt to obtain a certificate of authority by converting its corporate form to that of a non-profit corporation, or by qualifying under the general insurance laws without first attempting to qualify under the exemption. But, if defendant does make such efforts towards compliance or establishment of a right to exemption, the success of its efforts will be determined on another day.

Accordingly, the motions for summary judgment by plaintiffs in both cases are granted, and the cross-motion by defendants, North American Dental Plans, Inc., for summary judgment is denied.

Mr. Meisel will prepare and submit to the Court on five-days' notice to other counsel a form of judgment consistent with this opinion pursuant to R.4:42-1(b). It is my understanding that plaintiff, New Jersey Dental Service Plan, Inc., has abandoned its claim for monetary damages, that claim being presented only for the purpose of enabling plaintiff to have standing in the case prior to the institution of the companion action by the State of New Jersey. The judgment may include a provision for a declaratory judgment that defendants are illegally engaging in the activities of a dental service corporation in violation of the statute. Injunctive relief will also be granted, but the terms of that injunction may create problems because of the existing contracts. It is unlikely that it will be appropriate to precipitously terminate those contracts, since to do so would create far greater public

harm than public good. Since undoubtedly this judgment will be appealed by defendant a stay of the execution of the judgment will eliminate any immediate problems. However, counsel are directed to discuss among themselves the question of appropriate injunctive terms to be included in the judgment, and if they are unable to reach agreement the Court will entertain further argument on the form of the judgment in this respect.
[At which time the opinion then ended.]

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
BOARD OF DENTISTRY

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ADMINISTRATIVE ACTION

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IN THE MATTER OF AN INQUIRY REGARDING THE ALLEGED UNLAWFUL PRACTICE OF DENTISTRY IN THE STATE OF NEW JERSEY BY:

NORTH AMERICAN DENTAL PLAN,
A CORPORATION

—

DECISION.

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This matter was opened to the Board at the request of the New Jersey Dental Association by way of complaint alleging that the North American Dental Plan, a public corporation, is engaged in the practice of dentistry in this State in violation of the New Jersey Dental Practice Act. The Board determined that the allegations made should be considered in the context of an inquiry directed toward exploring the relationship then existing between N. A. D. P. and dentists licensed by this Board, as well as the relationship between N. A. D. P. and several trade unions using dental plans for their membership which are administrated by or through N. A. D. P. The Board's concern has been twofold. First, whether dentists in this State have aided or assisted the practice of dentistry by un-

licensed persons in violation of N. J. S. A. 45:6-7(e). Second, whether the relationship established by N. A. D. P. in its administration of dental plans constitutes the practice of dentistry as defined by N. J. S. A. 45:6-19(2) and in violation of N. J. S. A. 45:6-13. The Board invited interested parties to provide the factual background required by the Board. On May 21, June 11 and June 25, 1975 the Board heard the testimony of several dentists practicing in connection with N. A. D. P., the testimony of Joseph Cusumano, president of N. A. D. P., and received numerous exhibits from the Dental Association regarding the practices of N. A. D. P. Subsequent to these hearings, the Board was presented with further exhibits and testimony regarding N. A. D. P. from the records of N. A. D. P. and the depositions of its officers acquired in connection with a suit now pending between N. A. D. P. and the New Jersey Dental Service Plan. Finally, the Board, by subpoena issued in connection with the inquiry before it, obtained the records of Codesco Inc., a dental materials supply firm, concerning purchases by N. A. D. P. of dental supplies for delivery in this State.

Summary of Findings

N. A. D. P. is a public corporation established in this State for the purpose of planning, developing, marketing, and administrating programs for the delivery of dental care to members of trade unions or other similar organizations. The corporation is not owned by dentists licensed in this State and it is operated for profit. Essentially, N. A. D. P. enters into written contracts with the bargaining agents of unions whereby N. A. D. P. agrees to see to it that dental care will be rendered to the members of the union by dentists who enter into oral agreements with N. A. D. P. to perform the services as negotiated by

N. A. D. P. The testimony of the several dentists and of Mr. Cusumano make it clear that the dentists practicing through N. A. D. P. have little if any contact with the union or its bargaining agents.

N. A. D. P. constructs various programs for dental care including a listing of services that will be performed for the members of a union without direct charge to the patient. Compensation for this aspect of the plan is accomplished by charging the union a fixed fee per month multiplied by the total number of union members eligible to take advantage of the dental plan. These payments are forwarded by the union to N. A. D. P. on a monthly basis. N. A. D. P. in turn deducts from this amount a fixed percentage which it retains as its so-called administration fee. The remainder is forwarded to the dentists who are performing the services. These fees are collected and distributed regardless of the services actually performed. It is an attractive arrangement for the dentist because it represents a guaranteed minimum fixed income and it is attractive to the union because it secures dental services for its entire membership at a rate comparable to or below the average or expected average cost of dental care for its membership.

In addition to the services listed in the basic plan, N. A. D. P. also offers additional dental services which will be performed at fees fixed by N. A. D. P. These fees are paid directly by patients to the dentists working with N. A. D. P. Representatives of N. A. D. P. actively solicit and market these plans to various unions. Once a plan is accepted by a union, N. A. D. P. maintains a patient complaint service whereby N. A. D. P. seeks to satisfy or resolve any misunderstandings or difficulties that arise between the practicing dentists and union membership. It is apparent from the correspondence we have reviewed

that the union and its membership looks to N. A. D. P., rather than the professional dentist, to insure that the care rendered is satisfactory. Indeed, one piece of correspondence sent to N. A. D. P. by a union indicated that if N. A. D. P. could not resolve certain disputes and otherwise improve the dental care offered, the union would terminate its contract with N. A. D. P. In this regard, we note that an employee of N. A. D. P., maintains office space in the office of one of the dentists working with N. A. D. P. functioning as a patient relations director. The correspondence of this individual clearly shows that N. A. D. P. interposes itself between the dentist and his patients to resolve disputes for the benefit of N. A. D. P.'s continuing good relations with the union.

When N. A. D. P. commenced its business activities in this State, it purchased and outfitted with dental equipment a large office in the city of Camden in direct violation of N. J. S. A. 45:6-19. According to Mr. Cusumano, upon learning that the ownership of this office and its equipment by non-dentists was illegal, N. A. D. P. divested itself of its interest in this office by selling it to one of its participating dentists. N. A. D. P. still holds a security interest in this dental equipment against the unpaid balance of the purchase price. Subsequent to the sale of the Camden dental office, N. A. D. P. purchased and outfitted a second dental office in Northfield. Moreover, N. A. D. P. has been constantly acquiring numerous and various dental supplies and materials from the Codesco Co., for delivery at the dental offices located in Camden and Northfield. The delivery slips and invoices presented to the Board by Codesco identify the purchaser as N. A. D. P., rather than the dentists practicing with N. A. D. P.

N. A. D. P. has maintained that it does not "employ" the dentists that agree to service the contracts that N. A. D. P. negotiates with unions. It indicates that the dentists are independent contractors. At the outset of its activities in New Jersey, it placed at least one advertisement which on its face sought employee dentists in this State. In addition, several pieces of early correspondence written by representatives of N. A. D. P. to potential union clients identified its participating dentists as employees. Mr. Cusumano indicated that these exhibits were mistakes by N. A. D. P. and that notwithstanding the words used, dentists were not employed by N. A. D. P. A review of numerous other pieces of correspondence between N. A. D. P. and prospective union clients, however, shows that N. A. D. P. considers these dentists as a part of its corporate organization and the offices of these dentists as N. A. D. P.'s offices.

The relationship between N. A. D. P. and these dentists is most clear from a review of N. A. D. P.'s correspondence relating to its marketing or solicitation of a dental plan. Part of its sales presentation includes the description of the extent and quality of the dental facilities and professional personnel that will be available to the union if its contracts with N. A. D. P. For example, N. A. D. P. represent that it, not the dentists, "is providing quality dentistry to more than 60,000 union members", that "N. A. D. P. has 7 regional dental centers in the Tri-State area with 14 satellite centers", that N. A. D. P. "guarantees not to increase monthly payments", that N. A. D. P. maintain in *its* dental centers" an administrator to check the dentist", that N. A. D. P. "guarantees that the dental patient has gotten the best quality dentistry" that the quality of service offered by N. A. D. P. is "generally not to be found in the average practicing dentist's office." This type of comment by N. A. D. P. permeates its literature and correspondence.

Only a handful of dentists are participants in the N. A. D. P. plans. Their practices include patients not part

of N. A. D. P. plans, but they estimate that from 75% to 90% of their practices are devoted to fulfilling N. A. D. P.'s union contracts. Further, they are aware that N. A. D. P. actively solicits union contracts and are aware that each new contract arranged by N. A. D. P. will increase the amount of their monthly income from N. A. D. P. as well as increases the number of patients relying on them for dental services.

Finally, N. A. D. P. has not viewed itself as an insurance company but considers insurance offerings in the dental care area to be its major competition. In this regard, it acknowledges that one of the major advantages that it has over other insurance offerings is that it not only guarantees payments for dental service rendered but further guarantees that it will provide quality dental care for participating members.

Conclusion.

At the outset we wish to make two points clear. We find nothing unprofessional or illegal in a decision by a dentist to agree to render professional services on a fixed fee basis without regard to the actual services rendered. If a patient, or authorized agent for a group of patients wishes the security of knowing the precise amount that will be paid for dental services and further desire to evenly distribute this expense over a period of time, it is not unprofessional for a dentist to agree to be available to render enumerated services as needed and to accept compensation on the basis of a pre-determined "retainer" rather than a fee-for-service basis. We are aware of the fear expressed by some that a "retained" dentist will be inclined to avoid performing needed services for his patients so as to increase his profits. We are also aware, however, that a dentist using the fee-for-service method

may charge unreasonable fees for his services or may encourage patients to undergo unnecessary procedures simply to increase profits. Our tendency, therefore, is to conclude that the integrity of the practitioner rather than his method of compensation, governs the decisions he must make regarding the dental health of his patients.

With respect to contracts between dentists and unions for care to be rendered for union members, the Board fully recognizes the advantages of union participation in securing for their members the services of various professionals including dentists. The Dental Practice Act expressly provides for the regulation of corporate or industrial dental clinics owned by non-dentists and operated, not-for-profit, by a union or employer for its membership or employees. Moreover, since at least 1967 the Board has approved of union or employee efforts to seek out dentists to provide group dental care at the private offices of a practitioner when such arrangements are not-for-profit union or management benefits.

N. A. D. P. is not a union and it is not the agent of any union. It is an independent corporation designed solely for the purpose of marketing and providing dental services. If N. A. D. P. merely offered a service available to dentists to render advice and assistance to a dentist requested by a union to propose an adequate method of providing dental care to its membership, or available to a union to give similar advice in aid of its desire to retain one or more dentists for its membership, the Board would conclude that N. A. D. P. is not practicing dentistry. Instead, it is a lay corporation which offers, undertakes and holds itself out as practicing dentistry. Particularly, N. A. D. P. has undertaken to direct and control the practice of dentistry by several licensed dentists rendering their professional control clearly subordinate or subject to lay

control. Advertising and solicitation of a character prohibited by N. J. S. A. 45:6-7(g) is controlled solely by N. A. D. P. The negotiations with the union are carried out solely by N. A. D. P. The design of the dental plans are solely the province of the lay corporation. N. A. D. P. lends its financial support to acquire and outfit dental offices to be used by its participating dentists in fulfilling N. A. D. P.'s contracts and N. A. D. P. acquires or arranges for the acquisition of dental supplies and materials to be used by its dentists. Patient relations and disputes are handled by N. A. D. P. for its benefit in maintaining its union contracts. And finally, N. A. D. P. profits from the work performed or agreed to be performed by its dentists by accepting a percentage of the "retainer" paid by the union. The only aspect of dentistry as here practiced that is not undertaken by N. A. D. P. is the actual performance of dental operations by lay personnel. Each of the dentists used by N. A. D. P. are made to be technicians whose control over their number of patients, their fees, their offices—its supplies and equipment, their advertisement and contractual obligations, and their patient relationships are subject to the overriding control of N. A. D. P. The records of N. A. D. P. convince us that it, not these licensees is the actual manager, operator or conductor of these dental practices within the meaning of N. J. S. A. 45:6-19.

With respect to the dentists practicing under the control of N. A. D. P., it follows that in permitting N. A. D. P. to control their practices and in relinquishing their professional prerogatives they have aided and assisted a nonlicensed entity to practice dentistry contrary to N. J. S. A. 45:6-7(e). We note, however, that for a long period of time the Board had not made its position known and in fact was unable to reach a position until a clearer factual

picture of the nature of N. A. D. P. was brought before the Board. Nonetheless, N. J. S. A. 45:6-7(g) expressly prohibits a dentist from directly or through solicitors or publicity agents advertising his products or the price, character or durability of his services. N. A. D. P. has in this respect commercialized dentistry to a highly unprofessional degree and has violated that provision of the law. Due to the small number of dentists employed by N. A. D. P., its activities in this area were to their direct and substantial benefit. Even though the dentists employed by N. A. D. P. never participated in this aspect of their practice, their testimony indicates that they were aware that it was occurring but that they failed to take any steps to curtail or control these activities. There has never been any question that a dentist cannot solicit clientel whether individuals or groups. There should have been no reluctance on the part of these dentists to prevent N. A. D. P. from soliciting group clientel on their behalf.

RESOLUTION.

Whereas it appears to the Board, based on its review of the testimony and documents presented by the New Jersey Dental Association, the Office of the Attorney General, and by N. A. D. P., that N. A. D. P. is a lay corporation unlawfully engaged in the practice of dentistry for profit in this State, and

Whereas it further appears that the several dentists licensed by this Board and engaged in the practice of dentistry with N. A. D. P. have aided and assisted in such unlawful practice of dentistry and have permitted the unlawful solicitation and advertisement of dentistry in this State,

Be it resolved that the New Jersey State Board of Dentistry directs the following:

1. That N. A. D. P., its officers, agents, representatives or employees cease and desist from:

a. Holding itself out, offering, or undertaking to practice dentistry, provide dental care, guarantee the performance of dental services or from other like or similar activities or representations regarding the availability of dental care or services by or through N. A. D. P.

b. Soliciting, canvassing or advertising that dental care or services may be obtained from or through N. A. D. P. or from any licensee or group of licensees of this Board whether named or unnamed who are employed by or associated with N. A. D. P. for the purpose of providing dental services on behalf of or under the direction and control of N. A. D. P.

c. Providing directly or indirectly dental equipment, materials, devices or instruments for use by licensees of this Board in connection with the performance of dental services contracted or arranged by N. A. D. P.

d. Representing that it possesses, owns, operates, manages, or controls dental offices or clinics or any other place where dentistry is performed or possessing, owning, operating, managing, or controlling same.

e. Interposing itself between licensees of this Board and their patients as an arbiter, supervisor or consultant for problems, disputes or relations between patient and licensee.

f. Obtaining any form of compensation for or connected with dental services rendered or promised to be rendered by licensees of this Board.

2. That the licensees of this Board employed by or associated with N. A. D. P. shall cease and desist from:

a. Permitting N. A. D. P. to solicit, canvass, or advertise for the benefit of their respective professional practices.

b. The purchase or use of dental equipment, materials, devices or instruments for use in their respective practices provided by or through N. A. D. P. in connection with contracts or arrangements undertaken by N. A. D. P. for the delivery of dental care and services.

c. Permitting N. A. D. P. to participate, in any form, in their respective patient-dentist relationships.

d. Permitting N. A. D. P. to profit from or be compensated for, in any form, the performance of their dental services or their promises to perform dental services or from otherwise receiving monies or other consideration the payment of which is attributable to the rendering of professional dental services contracted or arranged by or through N. A. D. P.

3. That in the event that compliance or substantial compliance with the foregoing direction is not voluntarily forthcoming or not accomplished within 90 days from the date of this decision, that the Office of the Attorney General institutes such administrative and judicial proceedings as required by law to enforce the provisions of the Dental Practice Act with respect to the acts and practices of N. A. D. P. and of the licensees of this Board associated with N. A. D. P.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

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Civil Action No. 75-2022

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HEALTH CORPORATION OF AMERICA, INC., et al.

v.

NEW JERSEY DENTAL ASSOCIATION, et al.

APPEARANCES:

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Attorneys for Defendants

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OPINION

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BROTMAN, *District Judge*

The issue before the court is whether plaintiffs' violation of New Jersey statutes precludes them from maintaining this antitrust action.

Plaintiffs are Health Corporation of America, Inc. (hereinafter Health Corp.) and its wholly owned subsidiaries North American Dental Plans, Inc., a New Jersey Corporation (hereinafter North American of New Jersey) and North American Dental Plans, Inc., a Pennsylvania Corporation (hereinafter North American of Pennsylvania). The parent corporation supplies managerial and executive services for its wholly owned subsidiaries as well as independent entities. The subsidiaries design and administer dental health programs for groups such as unions. They enter into agreements with various dentists in the state of New Jersey and elsewhere whereby such dentists agree to provide professional services for group members. They have brought this action under sections 4 and 16 of the Clayton Act, 15 U. S. C. §§ 15, 26, to recover for alleged violations of sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2.

Defendants are New Jersey Dental Association, Mercer Dental Society, Southern Dental Society of the state of New Jersey, and New Jersey Dental Service Plan (hereinafter DSP), not-for-profit corporations involved in the operation of dental health plans in the state of New Jersey. Also named as defendants are several individuals who are present or former officers of the corporate defendants.

Plaintiffs allege that the defendants have conspired to restrain trade in the provision of health care programs and benefits in violation of section 1 of the Sherman Act by instituting sham lawsuits and regulatory board proceedings, and by using threats, harassment, coercion and the dissemination of misinformation to induce dentists not to contract with plaintiffs. It is alleged that these acts also constitute a conspiracy to monopolize and the monopolization of the delivery of dental health care programs in violation of section 2 of the Sherman Act, tortious interference with

plaintiffs' business, and violations of sections 3 and 4 of the New Jersey Antitrust Act, N. J. S. A. §§ 56:9-3, 56:9-4 (1970).

This case is presently before the court on defendants' motion to dismiss under rule 12(b)(6) for failure to state a claim upon which relief may be granted. Defendants allege that plaintiffs lack standing under sections 4 and 16 of the Clayton Act because their business or property is not worthy of legal protection. Defendants' motion is not brought properly under rule 12(b)(6) which mandates the making of such a motion "before pleading if a further pleading is permitted." Defendants have already answered and filed an earlier motion for partial summary judgment which was denied. The fact that matters outside the pleadings must be considered in deciding the motion also precludes the use of 12(b)(6). The court, therefore, will treat the motion as one for summary judgment and dispose of it in accordance with rule 56. Fed. R. Civ. P. 12(b).

The bases for defendants' motion are decisions by the Superior Court of New Jersey and the New Jersey State Board of Dentistry finding plaintiffs in violation of certain New Jersey statutes. Defendant DSP instituted suit against North American of New Jersey and North American of Pennsylvania in the Superior Court of New Jersey for operating a dental service plan in violation of the Dental Service Corporation Act of 1968, N. J. S. A. §§ 17:48C-1 to 48C-36 (1968). The court held that the activities of plaintiffs were covered by the statute and were illegal. *New Jersey Dental Service Plan, Inc. v. North American Dental Plans, Inc.*, Docket No. C2256-74 (Sup. Ct., N. J., Oral Opinion delivered April 30, 1976). This decision is presently on appeal. In an administrative proceeding, the New Jersey State Board of Dentistry concluded that North American of New Jersey was engaged in the practice of dentistry in violation of the Dental Practice Act, N. J. S. A. §§ 45:6-1 to 6-47 (1963). Plaintiff and the Board entered into a consent order and settlement in which plaintiff agreed to pay $50,000 and to modify its operations; and, the Board agreed to forego instituting judicial action to compel compliance with the provisions of the statute.[1]

Defendants contend that plaintiffs cannot seek the protection of the antitrust laws for a business which has been conducted in violation of New Jersey law. Although defendants characterize their basis for dismissal as a lack of standing on the part of plaintiffs, the thrust of their argument is that plaintiffs' illegal activities preclude them from enforcing the antitrust laws. They argue, in effect, that plaintiffs come into court with unclean hands, that plaintiffs' failure to comply with statutory requirements is a defense to any antitrust violations defendants may have committed. No matter how defendants classify their contentions, the Supreme Court cases of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951) and *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U. S. 134 (1968) must remain a starting point.[2] In *Kiefer*, defendants introduced evidence that plaintiff had agreed with other wholesalers to set minimum prices for the sale of liquor in violation of the antitrust laws. The Supreme Court held that this was no defense to defendants' own illegal conduct. "If [plaintiff] and others were guilty of infractions of the antitrust laws, they could be

1. In the Matter of the Practice of Dentistry in the State of New Jersey by North American Dental Plans, Inc., Settlement, Consent and Order (June 2, 1976).

2. *See also* Richard L. Frost v. Shipowners & Merchants Towboat Co., 1974-1 CCH Trade Cases ¶ 75-121 (N. D. Cal. 1974) (defendants' characterization of their claim to avoid the thrust of *Kiefer* and *Perma* is unsuccessful); Waldron v. British Petroleum Co., Ltd., 231 F. Supp. 72, 92 (S. D. N. Y. 1964) (a reformulation of defendants' defense does not change the substance of the matter).

held responsible in appropriate proceedings brought against them by the Government or by injured private persons." *Id.* at 214. In *Perma*, plaintiffs were dealers who operated Midas Muffler Shops. They brought suit against Midas, Inc. and its subsidiaries, alleging that the sales agreements which they had made with defendants were in violation of the antitrust laws. The district court held plaintiffs' claims barred by the doctrine of *in pari delicto*. The court of appeals affirmed because plaintiffs had voluntarily entered into the franchise agreements which they were now challenging. The Supreme Court reversed:

> [T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct. *Id.* at 139.

Defendants' argument in the case at bar is less compelling than that of the defendants in *Kiefer* and *Perma*. Plaintiffs in those cases were guilty of the same type of anti-competitive activity with which defendants were charged. The Supreme Court, nevertheless, was unwilling to insulate those defendants from the effect of the antitrust laws. Here, plaintiffs have been found to be in violation of regulatory statutes unrelated to the strong national policy of encouraging private enforcement of the antitrust laws. The New Jersey Dental Service Corporation Act and the Dental Practice Act contain their own procedures for enforcement which have been utilized in this case. Plaintiffs have paid $50,000 and restructured their operations to comply with the administrative decision. Further changes may have to be made as a result of the decision of the Superior Court of New Jersey. Defendants are not saying that they are innocent of antitrust violations. Instead, they are contending that whether or not they have monopolized the delivery of dental health care programs in the state of New Jersey, plaintiffs should not be allowed to recover. Dismissal would increase the penalties which the state legislature has seen fit to include in the statutory scheme and would greatly frustrate the private enforcement of the antitrust laws.

Defendants cite several cases in support of their position. Only two are worthy of discussion and they can be distinguished.[3] In *Maltz v. Sax*, 134 F. 2d 2 (7th Cir.

3. The court agrees with plaintiffs that Okefenokee Rural Electric Membership Corp. v. Florida Power and Light Co., 214 F. 2d 413 (5th Cir. 1954) is more properly a government action case within the meaning of Parker v. Brown, 317 U. S. 341 (1943). *See American Bar Association, Antitrust Law Developments*, 408 n. 123 (1975). Martin v. Phillips Petroleum Co., 365 F. 2d 629 (5th Cir.), *cert. denied*, 385 U. S. 991 (1966), *rehearing denied*, 386 U. S. 930 (1967), primarily dealt with the degree of preparation to enter a business needed to invoke the protection of the antitrust laws. The contract involved was not considered "property" not only because invalid under Louisiana law but also because of other "infirmities." *Id.* at 634. Nor is Lamp Liquors, Inc. v. Adolph Coors Company, 410 F. Supp. 536 (D. Wyo. 1976) persuasive. Most of the district court opinion discusses the preeminence of state control over liquor sales by reason of the twenty-first amendment. The standing issue appears at the end of the opinion as an alternative ground of decision. *Martin v. Phillips Petroleum Co.*, discussed above, is the only case cited in support. We decline to follow the alternative holding of *Lamp Liquors*.

1943), the court dismissed plaintiff's private antitrust action on the ground that plaintiff's sole business was the manufacture and sale of gambling devices, which was unlawful and against public policy. The *Maltz* situation is very different from the case at bar. The administration of dental health care programs is not criminal or contrary to public policy. Plaintiffs Health Corporation and North American of New Jersey can bring their activities within the law with some operational changes. The *Maltz* plaintiff was engaged in an inherently illegal business. We think *Maltz* should be limited to its facts. *See Richard L. Frost v. Shipowners & Merchants Towboat Co.*, 1974-1 CCH Trade Cases ¶ 75-121 (N. D. Cal. 1974). Some of the broad language which appears in the court's opinion is suspect in light of the later *Kiefer* and *Perma* decisions by the Supreme Court.

Defendants' reliance on *Turner v. American Bar Association*, 407 F. Supp. 451, 479-80 (N. D. Tex. 1975) is misplaced. Plaintiffs in that case sued various members of the federal judiciary, the American Bar Association, and others, alleging violations of the antitrust and civil rights laws. At the core of their case was the claim that there is a constitutional right to have unlicensed lay counsel represent one in court. The court rejected this claim and dismissed the antitrust counts because of plaintiffs' failure to "demonstrate that there is in fact any property or business, present or future, that is deserving of legal protection." Plaintiffs in the case at bar are not contending that they have a right to operate without complying with New Jersey statutes. On the contrary, they are attempting to comply with the decision of the administrative agency and are appealing the decision of the Superior Court. In his opinion, Judge Lenox recognized the possibility of plaintiffs' restructuring their operations to come within a statutory exemption if his decision is sustained on appeal. *New Jersey Dental Service Plan, Inc.*, Oral Opinion at 57. The *Turner* decision, therefore, is not inconsistent with a denial of defendants' motion in this case.

The Tenth Circuit has decided a case factually very similar to the one before the court. *Semke v. Enid Automobile Dealers Association*, 456 F. 2d 1361 (10th Cir. 1972). A used car dealer brought a private antitrust action against franchised new car dealers who allegedly conspired to prevent plaintiff from furnishing new cars to customers. Defendants asserted as a defense plaintiff's noncompliance with an Oklahoma licensing statute. The Oklahoma Supreme Court had affirmed the entry of an injunction restraining plaintiff from selling new cars without a license. The court of appeals rejected the defense. It held that the licensing statute in question did not qualify as a state exemption under *Parker v. Brown*, 317 U. S. 341 (1943) and *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U. S. 127 (1961). Nor did the doctrine of *in pari delicto* or contributory illegality aid the defendants. *Id.* at 1367-70. Defendants argue that *Semke* did not discuss whether plaintiff suffered an injury to its business or property within section 4 of the Clayton Act. As was stated above, however, the substance of the claim is the same no matter what label is affixed. *See Calnetics Corp. v. Volkswagen of America, Inc.*, 532 F. 2d 674, 688-89 (9th Cir. 1976); *Purex Corp., Ltd. v. General Foods Corp.*, 318 F. Supp. 322 (C. D. Cal. 1970). Plaintiffs' claim will not be dismissed because they were in violation of state statutes. The state has enforced its statutes. This court will not impose an additional penalty.

Defendants' motion to dismiss is denied. Counsel will submit the appropriate order.

STANLEY S. BROTMAN
Stanley S. Brotman
United States District Judge

Dated: January 5, 1977

(Letterhead of)

JAMIESON, McCARDELL, MOORE, PESKIN & SPICER

January 7,, 1977

Honorable Stanley S. Brotman
United States Courthouse
4th and Market Streets
Camden, New Jersey 08101

Re: Health Corporation of America, et al. v.
New Jersey Dental Association, et al.
Civil Action No. 75-2022

Dear Judge Brotman:

This will confirm my telephone conferences with your law clerk, Mary McLaughlin, in which I requested that the Order denying defendants' motion to dismiss, which was submitted to the Court by Mr. Cohen, *not* be signed until the undersigned has had an opportunity to present argument why an interlocutory appeal would be appropriate in this case. I further mentioned to Ms. McLaughllin we would be happy to submit a written memorandum on the appropriateness of an interlocutory appeal prior to presenting an oral argument.

In his letter to you dated January 6, 1977, Mr. Cohen stated that I had no objection to other provisions contained in the proposed Order. I believe that Mr. Cohen misunderstood our conversation because I do wish to be heard on the terms of the Order.

Thank you for your consideration in this matter.

Very truly yours,,
ARTHUR MEISEL

fe
CC Bruce K. Cohen, Esq.
Peter Thorndike, Esq.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

—

CIVIL ACTION No. 75-2022

—

HEALTH CORPORATION OF AMERICA

v.

NEW JERSEY DENTAL ASSOCIATION, et al.

—

ORDER.

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This matter being opened to the Court by Jamieson, McCardell, Moore, Peskin & Spicer, a professional corporation, attorneys for defendants, Arthur Meisel, Esquire and Thomas P. Weidner, Esquire appearing, in the presence of Meredith & Cohen, Bruce K. Cohen, Esquire appearing, and Wallace, Mariano, Thorndike and Brennan, Peter Thorndike, Esquire appearing, attorneys for plaintiffs; and the Court having considered the memoranda of the parties and the arguments of counsel,

IT IS on this 18th day of January, 1977,

ORDERED that defendants' Motion to Dismiss the complaint for failure to state a claim upon which relief can be granted grounded on plaintiffs' lack of standing to maintain a private antitrust action Be and is Hereby DENIED; and

FURTHER ORDERED that the stay of discovery proceedings Ordered by this Court on the 8th day of October, 1976 is Hereby DISSOLVED, and it is

FURTHER ORDERED that the parties shall answer or object to all outstanding interrogatories and requests to produce documents within ten (10) days of the date of this Order.

STANLEY S. BROTMAN
Stanley S. Brotman, U. S. D. J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
STANLEY S. BROTMAN
Judge

Camden, N. J. 08101
United States Court House

January 18, 1977

Bruce K. Cohen, Esq.
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Peter R. Thorndike, Esq.
Messrs. Wallace, Mariano, Thorndike & Brennan
328 Market Street
Camden, New Jersey 08101

Arthur Meisel, Esq.
Messrs. Jamieson, McCardell, Moore,
Peskin & Spicer
19 Chancery Lane
Trenton, New Jersey 08618

Re: Health Corporation of America, Inc. v. New Jersey Dental Association–C. A. No. 75-2022

Dear Counsel:

Enclosed is a copy of the order I have entered in the above case. I have decided not to certify the order under 28 U. S. C. 1292(b).

Very truly yours,

STANLEY S. BROTMAN
Stanley S. Brotman

SSB:mhg
Enclosure

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
STANLEY S. BROTMAN
Judge

Camden, N. J. 08101
United States Court House

January 27, 1977

Arthur Meisel, Esq.
Messrs. Jamieson, McCardell, Moore,
Peskin & Spicer
19 Chancery Lane
Trenton, New Jersey 08618

Re: Health Corporation of America, Inc. v. New Jersey Dental Association—C. A. No. 75-2022

Dear Mr. Meisel:

This court has signed its order on January 18, 1977. That order is final and *will not be reconsidered.*

Please proceed with your responses to plaintiffs' discovery.

Very truly yours,

STANLEY S. BROTMAN
Stanley S. Brotman

SSB:mhg
cc: Bruce K. Cohen, Esq.
Peter R. Thorndike, Esq.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—

No. 77-1268

—

NEW JERSEY DENTAL ASSOCIATION, a not-for-profit corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a not-for-profit corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a not-for-profit corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a not-for-profit corporation of the State of New Jersey, DR. PAUL G. ZACKON, an individual, DR. DONALD DeFONCE, an individual, DR. EUGENE BASS, an individual, DR. LEWIS KAY, an individual, DR. STANTON DEITCH, an individual, DR. ROBERT FISCHER, an individual, and DR. JOSEPH POLLACK, an individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

—

(D. C. Civil No. 75-2022)

—

Before: BIGGS, MARIS and ADAMS, *Circuit Judges.*

ORDER.

The petition for writ of mandamus is denied.

By THE COURT,

ARLIN M. ADAMS
Circuit Judge

DATED: February 24, 1977

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1651.

NEW JERSEY DENTAL ASSOCIATION, a Not-For-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-For-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-For-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-For-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Attorneys for Respondents Health Corporation of America, et al.

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INDEX TO BRIEF.

TABLE OF CITATIONS.

QUESTIONS FOR REVIEW.

1. Will a Writ of Mandamus issue to compel a district judge to reverse his legal Opinion and interlocutory Order denying Petitioners' motion to dismiss a private antitrust action?

2. Will a Writ of Mandamus issue to compel a district judge to reverse his opinion that an immediate appeal of an interlocutory order did not ". . . involve[s] a controlling question of law as to which there is substantial ground for difference of opinion . . ." and that such an appeal would not "materially advance the ultimate termination of the litigation"?

STATUTES INVOLVED.

28 U. S. C. Section 1292(b).

Interlocutory Decisions.

• • •

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order. (June 25, 1948, ch. 646, 62

Stat. 929; Oct. 31, 1951, ch. 655, Section 49, 65 Stat. 726; July 7, 1958, Pub. L. 85-505, Section 12(e), 72 Stat. 348; Sept. 2, 1958, Pub. L. 85-919, 72 Stat. 1770.)

United States Code, 1970 ed., Volume 5, page 7563

28 U. S. C. Section 1651.
Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction. (June 25, 1948, ch. 66, 62 Stat. 944; May 24, 1949, ch. 139, Section 90, 63 Stat. 102.)

United States Code, 1970 ed., Volume 5, page 7601

STATEMENT OF THE CASE.

Plaintiffs below, who are Respondents herein along with the Honorable Stanley S. Brotman, United States District Judge for the District of New Jersey, filed this private antitrust action against Petitioners in November, 1975. Instituted pursuant to Sections 4 and 16 of the Clayton Act, 15 U. S. C. Sections 15 and 26, the action alleges violations of Sections 1 and 2 of the Sherman Act, 15 U. S. C. Sections 1 and 2. On December 18, 1975, Petitioners filed their Answer and Counterclaim. On October 8, 1976, within a few days of the commencement of a mutually agreed upon discovery schedule, Petitioners gave notice that they intended to file what was denominated a Motion to Dismiss the Complaint. The District Court recognized that Petitioners' motion was properly in the nature of a summary judgment procedure and treated it as such (A48). After review of the briefs submitted by the parties as well as consideration of the oral argument, the District Court denied Petitioners' Motion (A46 et seq.). Subsequently, after an oral hearing, the District Court denied Petitioners' request that the Court reconsider its decision and further determined that, as the criteria as set forth by 28 U. S. C. Section 1292(b) were not met, an interlocutory appeal would be inappropriate (A57). Thereafter, on February 22, 1977, Petitioners filed a petition for a Writ of Mandamus with the United States Court of Appeals for the Third Circuit, which was denied on February 24, 1977 (A59).

ARGUMENT.

I. Petitioners Are Not Requesting a Petition for Writ of Certiorari.

Despite titling their Petition in the alternative, it is clear that Petitioners are only requesting that the Court grant permission to file a Petition for a Writ of Mandamus and do not seriously assert that a Writ of Certiorari should issue. This is plainly evident when one examines Petitioners' "Questions for Review" found on page six of their brief. According to Petitioners, what is to be determined by this Court is whether a District Court can be subject to a Writ of Mandamus for denying a motion to dismiss, by Petitioners, in a private antitrust action and whether the District Court can be required, by Writ of Mandamus, to certify that denial of the motion to dismiss for interlocutory appeal pursuant to 28 U. S. C. Section 1292(b). No mention is even made of whether a Writ of Certiorari could properly issue.

Further support for the contention that Petitioners are not requesting that a Writ of Certiorari issue comes upon review of Petitioners' statement of which statutes are involved in this proceeding, starting on page six of their brief. Simply put, 28 U. S. C. Section 1254(a), the statute pursuant to which a Writ of Certiorari is granted, is not listed by Petitioners as one which is involved herein.

Finally, Rule 19 of the Rules of the Supreme Court sets forth the considerations governing review on Writ of Certiorari and states that it "is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor". However, Petitioners have not made one argument or

vouchsafed one reason why or for what "special and important reason" this Court should exercise its discretion and issue a Writ of Certiorari. Instead, their entire brief is devoted to explaining why a Writ of Mandamus is appropriate.

Clearly then, Petitioners have not requested that a Writ of Certiorari issue to the United States Court of Appeals for the Third Circuit.

II. A Writ of Mandamus Is Wholly Inappropriate.

A. A Writ of Mandamus Is Not to Be Used in Place of an Appeal.

The primary thrust of Petitioners' argument is that the District Court was incorrect in refusing to grant their motion to dismiss the Complaint. While Respondents, plaintiffs below, strongly contend that the District Court was correct in so doing, the question of the legal accuracy of that decision is completely irrelevant. Petitioners would have this Court issue a Writ of Mandamus to a District Court as a result of the lower court's determination of a legal issue in an interlocutory order. However, as was stated in *Gulf Research and Development v. Harrison*, 185 F. 2d 457, 459 (9th Cir. 1950):

> ". . . it has been repeatedly held that: 'Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. . . . [T]hey have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. . . . As extraordinary remedies, they are reserved for really extraordinary causes.' Ex parte Fahey, 1947, 332 U. S. 258, 259-

60, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041. In this case, no extraordinary circumstances have been called to our attention. Petitioner alleges nothing more than an erroneous application of the law. The error, if any, will be reversible on appeal to the Court of Appeals for the Third Circuit, after final judgment has been entered. Mandamus cannot be subverted to perform the function of an interlocutory appeal, over which we have no jurisdiction. The inconvenience of proceeding to what may be an unnecessary trial has long been recognized as one of the hardships of litigation in our judicial system, but such hardship does not measure up to the inconveniences which would result if piecemeal appeals were permitted. Accordingly, this inconvenience has consistently been held insufficient to justify mandamus."

Well over one hundred years ago, this Court forcefully stated that what Petitioners have asked is totally impermissible:

> "Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed . . . .
>
> "Power is given to this court by the Judiciary Act, under a writ of error or appeal, to affirm or reverse the judgment of the Circuit Court, and in certain cases to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate court. Such a writ cannot perform the functions of an appeal or writ of error as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give any such direction or to interfere in any manner with the judicial discretion and judgment of the subordinate court." *Ex. Parte Newman*, 81 U. S. 152, 169-70 (1871).

See also *Roche v. Evaporated Milk Association*, 319 U. S. 21, 63 S. Ct. 938 (1943); *Norte & Co. v. Defeance Industries, Inc.*, 319 F. 2d 336 (2d Cir. 1963); *DeBeers Consol. Mines v. U. S.*, 325 U. S. 212, 65 S. Ct. 1130 (1945); *A. C. Nielson Co. v. Hoffman*, 270 F. 2d 693 (7th Cir. 1959); and *Schlagenhauf v. Holder*, 379 U. S. 104, 112, 85 S. Ct. 234, 239 (1964), where it was said:

> ". . . The writ of mandamus is not to be used 'when the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction'. Parr v. United States, 351 U. S. 513, 520, 76 S. Ct. 912, 917, 100 L. Ed. 1377; see Bankers Life & Casualty Co. v. Holland, supra, 346 U. S. at 382, 74 S. Ct. at 147."

It is clear that in making its decision on the motion to dismiss, the District Court was performing a function within its jurisdiction. The most that can be contended by Petitioners is that the decision was erroneous. Under these circumstances to request that a Writ of Mandamus issue to force the District Court to change that decision is clearly inappropriate.

B. A Writ of Mandamus Will Not Issue to Compel a District Court to Make a Certification Pursuant to 28 U. S. C. Section 1292(b).

Prior to 1958, the principle, operative since the beginning of the Republic, stood fast that, except for a very few statutorily described orders, interlocutory appeals were forbidden. However, recognizing that in some instances, interlocutory appeals would be beneficial, Congress enacted 28 U. S. C. Section 1292(b). Nonetheless, great care was taken to ensure that the litigation process was not overly disrupted, and the judicial system overwhelmed, by a flood of interlocutory appeals. Therefore, both the District Court and the Court of Appeals were required to examine each petition for interlocutory appeal and, through exercise of their discretion, certify that the situation was one which mandated avoidance of the final judgment rule. Given this background, to suggest, as do Petitioners, that the District Court's determination that this is not a case for interlocutory review should be ignored, is somewhat startling.

Notwithstanding Petitioners' assertion that the Second Circuit has endorsed the suggestion that a writ of mandamus can issue to compel certification pursuant to 28 U. S. C. Section 1292(b), by a district court, not one court has ever taken such a drastic step. In fact, the Second Circuit, along with every other Court of Appeals which has had to decide the issue has strongly indicated that it would never be done.

> "Finally, we cannot conceive that we would ever mandamus a district judge to certify an appeal under 28 U. S. C. Section 1292(b), in plain violation of the Congressional purpose that such appeals should be heard only when both the courts concerned so desire." *D'Ippolito v. Cities Service Co.*, 374 F. 2d 643, 649 (2d Cir. 1967).

Japan Line Ltd. v. Sabre Shipping Corp., 407 F. 2d 173 (2d Cir. 1969) which Petitioners cite as authority for their contention that the Second Circuit concurs with their position actually does not involve the question *sub judice* at all. In reality, the Court was deciding whether the denial of a 28 U. S. C. Section 1292(b) certification barred a writ of mandamus with regard to the underlying order. The Court did not consider the propriety of mandamus to review the denial of the interlocutory appeal. The Second Circuit decided that in an appropriate case they could issue such a writ of mandamus but in no way disavowed the statement made in *D'Ippolito v. Cities Service Co., supra.* In fact, *D'Ippolito* was cited by the Court in *Japan Line Ltd. v. Sabre Shipping Corp., supra* as authority for the statement quoted by Petitioners in their brief. In 1972, the Second Circuit had occasion to address this question again and stated:

> "Judge Ryan did not explicitly rule on defendants' motions to dismiss on the ground of *forum non conveniens*, nor include this issue among the questions certified pursuant to 28 U. S. C. Section 1292(b). Defendants' request that we mandamus him to certify the issue meets an insurmountable obstacle. Congress plainly intended that an appeal under Section 1292(b) should lie only when the district court and the court of appeals agreed on its propriety. It would wholly frustrate this scheme if the court of appeals could coerce decision by the district judge. *D'Ippolito v. Cities Service Co.*, 374 F. 2d 643, 649 (2 Cir. 1967); see 9 Moore, Federal Practice, Section 110-22[3]" *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F. 2d 1326, 1344 (2d Cir. 1972).

Should this Court do as the Court of Appeals for the Third Circuit did and refuse Petitioners' attempts to have a Writ of Mandamus issue, Petitioners will suffer no harm or injury of any consequence. They will merely have to engage in the normal litigation process as contemplated by Congress and the Courts. At the time of final judgment in this action Petitioners can, if they so wish, appeal in the normal manner the District Court's refusal to grant their motion. In this situation, the courts have unanimously held the issuance of a writ of mandamus to be inappropriate.

> ". . . Nor is there a right in a situation of such circumstances to seek mandamus even where an attempt has been made and denied to proceed under Section 1292(b). Interlocutory orders whose consequences are able to be corrected by an appeal from a final judgment may not at all be made the subject of relief in mandamus except in extraordinary circumstances. (citations omitted).
>
> This means that, as to an interlocutory order, which the court has a judicial right to make, mandamus can be sought only to enable justice to be materially furthered in the procedural needs of some extraordinary situation. It cannot be sought merely to shortcut incidents of time, expense, inconvenience, new trial, etc. which are inherent in the orderly course of litigation generally." *Evans Electrical Const. Co. v. McManus*, 338 F. 2d 952, 953 (8th Cir. 1964).

See also *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 74 S. Ct. 145 (1953); *Williams v. Maxwell*, 396 F. 2d 143 (4th Cir. 1968); *Federal Savings and Loan Ins. Corp. v. Reeves*, 148 F. 2d 731 (8th Cir. 1945); *Regec v. Thornton*, 275 F. 2d 801 (6th Cir. 1960); *Norte & Co. v. Defeance Industries Inc.*, 319 F. 2d 336 (2d Cir. 1963).

Therefore, it is clear that mandamus is not appropriate to force a district court to certify an interlocutory order for appeal pursuant to 28 U. S. C. Section 1292(b).

III. Conclusion.

What Petitioners have asked this Court to do is allow them to circumvent the final judgment rule as well as the intent of Congress as embodied in 28 U. S. C. Section 1292(b). Respondents, plaintiffs below, firmly believe that the Writ of Mandamus does not exist for that purpose. Its use to compel the District Court to certify pursuant to 28 U. S. C. Section 1292(b) or to reverse a ruling of law would only open the floodgates to piecemeal appeals and completely disrupt the judicial system as it presently exists.

For that reason, Respondents, Health Corporation of America, et al. respectfully request that Petitioners' motion to be allowed to file a Petition for Writ of Mandamus be denied.

Respectfully submitted,

JOEL C. MEREDITH,
BRUCE K. COHEN,
MEREDITH & COHEN,
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1405 Locust Street,
Philadelphia, Pa. 19102
and
PETER THORNDIKE,
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Counsel for Respondents,
Health Corporation of America, et al.

IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1651

NEW JERSEY DENTAL ASSOCIATION, a Not-for-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-for-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-for-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-for-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual, and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No.

NEW JERSEY DENTAL ASSOCIATION, a Not-for-Profit Corporation of the State of New Jersey, MERCER DENTAL SOCIETY, a Not-for-Profit Corporation of the State of New Jersey, SOUTHERN DENTAL SOCIETY OF THE STATE OF NEW JERSEY, a Not-for-Profit Corporation of the State of New Jersey, NEW JERSEY DENTAL SERVICE PLAN, INC., a Not-for-Profit Corporation of the State of New Jersey, DR. PAUL G. ZACKON, an Individual, DR. DONALD DeFONCE, an Individual, DR. EUGENE BASS, an Individual, DR. LEWIS KAY, an Individual, DR. STANTON DEITCH, an Individual, DR. ROBERT FISCHER, an Individual, and DR. JOSEPH POLLACK, an Individual,

Petitioners,

v.

STANLEY S. BROTMAN, United States District Judge for the District of New Jersey,

Respondent.

PETITIONERS' REPLY TO BRIEF OF RESPONDENTS HEALTH CORPORATION OF AMERICA, ET AL. IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners respectfully submit the within brief pursuant to Rule 24 of the Revised Rules of the Supreme Court of the United States in reply to the brief of respondents Health Corporation of America, *et al.*

ARGUMENT.

Petitioners Seek Review Alternatively by Certiorari or Mandamus.

In their opposing brief, respondents Health Corporation of America, *et al.*, argue that petitioners are not requesting a petition for writ of certiorari, but seek only a petition for writ of mandamus. This argument is wholly without merit. Petitioners unequivocally state:

> "This matter is brought to review an order of the United States Circuit Court of Appeals for the Third Circuit rendered on February 24, 1977 and entered on the same date. The jurisdiction of the Supreme Court of the United States to review this suit (a) by certiorari is conferred by Title 28, *United States Code*, Section 1254(1), and alternatively, (b) by Writ of Mandamus pursuant to Title 28, *United States Code*, Section 1651."
>
> (Petitioners' Petition, p. 5)

Supporting authority for the procedural relief requested is found in *Schlagenhauf v. Holder*, 379 U. S. 104 (1964) cited by all counsel, where this Court granted certiorari to review the denial by the Court of Appeals of the Seventh Circuit of a petition for writ of mandamus.[1] Citing language set forth in *Bankers Life & Casualty Co. v. Holland*, 346 U. S. 379, 383 (1953), the Court concisely stated:

> "The writ [of mandamus] is appropriately issued . . .

1. See also *Thermtron Products, Inc. v. Hermansdorfer*, 423 U. S. 336 (1976) where a petition for a writ of certiorari was granted to review the denial of an alternative petition for a writ of mandamus or prohibition filed in the Court of Appeals for the Sixth Circuit, and *Kerr v. United States District Court*, 426 U. S. 394 (1976) where certiorari was granted to review the denial of a petition for mandamus, by order and without opinion, by the Court of Appeals for the Ninth Circuit.

> when there is 'usurpation of judicial power' or a clear abuse of discretion."
>
> *Schlagenhauf v. Holder*, 379 U. S., *supra*, at 110.

Petitioners respectfully contend that the refusal by a District Judge to decide a fundamental motion on the ground presented by the moving party effectively constitutes a usurpation of judicial power. Litigants are entitled as a matter of judicial propriety to receive a ruling upon the motion actually made rather than upon one which might have been—but was not—asserted.[2] That is especially true here where a favorable decision on the motion would put an end to expensive, complex and time consuming litigation.

In addition, the refusal by the trial judge to incorporate in his order the language required by 28 U. S. C. § 1292(b) so that leave could be sought to file an interlocutory appeal independently constitutes a clear abuse of discretion because it produces a result which Congress intended to avoid. The power of an appellate court to remedy such abuse by granting a writ of mandamus represents an important undecided question concerning the construction of 28 *U. S. C.* § 1292(b),[3] which should be reviewed by this Court.

2. In the case at bar, petitioners could have argued that respondents Health Corporation of America et al. came into Court with unclean hands. They *did not* raise that defense. Rather, they contended that said respondents had neither been injured in their business or property within the meaning of 15 U. S. C. § 15 nor suffered injury or damage under 15 U. S. C. § 26 because they were forbidden by an "affirmative command" of the State of New Jersey from engaging in the affected business, *Bates & O'Steen v. State Bar of Arizona*, — U. S. —, 45 LW 4895, 4898 (1977); *N. J. S. A.* 17:48C-34, *N. J. S. A.* 45:6-13.

3. In this connection, see *Gillespie v. U. S. Steel Corp.*, 379 U. S. 148, 154 (1964) where the Court of Appeals for the Sixth Circuit avoided the problem by treating the judgment rendered therein as final rather than interlocutory. Upholding the action of the Court of Appeals, this Court said:

> "it is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292(b) (1958

CONCLUSION.

Based upon the aforesaid argument and the arguments set forth in the petition for writ of mandamus and petition for writ of certiorari to the United States Court of Appeals for the Third Circuit filed with this Court on May 25, 1977, petitioners respectfully request the issuance of a writ of certiorari to review the decision in this matter by the Court of Appeals for the Third Circuit or, in the alternative and in order of preference, the issuance of a writ of mandamus directing respondent to (a) issue an order dismissing the private antitrust action brought against petitioners by Health Corporation of America, *et al.*, on the ground that they are without standing under Sections 4 and 16 of the Clayton Act, 15 *U. S. C.* § 15 and 26; (b) reconsider the motion to dismiss the aforesaid private antitrust action on the issue of standing alone, and not on the issue of unclean hands; or (c) incorporate in his order the language required by 28 *U. S. C.* § 1292(b) so that petitioners can seek leave to file an interlocutory appeal with the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

ARTHUR MEISEL,
HERBERT F. MOORE,
JAMIESON, MCCARDELL, MOORE, PESKIN AND SPICER,
A Professional Corporation,
Attorneys for Petitioners.

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3. (Cont'd.)
ed.) [which he did not do], the appeal unquestionably would have been proper; in light of the circumstances, we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292(b) by treating this obviously marginal case as final and appealable under 28 *U. S. C.* § 1291 (1958 ed.)"